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No. 08-__081001

IN THE

Supreme Court of the United States

ENERGEN RESOURCES CORPORATION,
Petitioner,

v.

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, deceased,
Respondent.

On Petition for a Writ of Certiorari to the New Mexico Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Due Process cap punitive damages at a ratio of one to one of compensatory to punitive damages where the jury awarded substantial compensatory damages, where the misconduct chargeable to the petitioner was recklessness and there was neither fraud nor malice?

2. Was New Mexico's appellate review of a punitive damages award constitutionally defective where its appellate court failed to conduct a de-novo review and based its review on prejudicial factors not relevant to the reprehensibility of petitioner's conduct?

RULE 29.6 STATEMENT

Petitioner Energen Resources Corporation's corporate parent is Energen Corporation. Energen Corporation is the only publicly-held company that owns ten percent or more of Energen Resources Corporation's stock.

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Petitioner Energen Resources Corporation ("Energen") respectfully petitions for a writ of certiorari to review the judgment of the New Mexico Court of Appeals in this case.

OPINIONS BELOW

The decision of the New Mexico Court of Appeals, issued September 22, 2008, is unreported. (App. A, p. 1a-24a) The decision denying Energen's Petition for Writ of Certiorari to the Court of Appeals, which the New Mexico Supreme Court denied, was issued on November 6, 2008, and is unreported. (App. B, p. 25a-26a) The decision of First Judicial District, State of New Mexico, issued on February 8, 2007, is unreported. (App. E, p. 32a-33a)

STATEMENT OF JURISDICTION

The New Mexico Court of Appeals entered judgment on September 22, 2008. The New Mexico Supreme Court denied Petitioner's timely Petition for Writ of Certiorari to the Court of Appeals on November 6, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

This case arises from an explosion at a natural gas wellhead owned by Energen in the San Juan Basin of New Mexico. The explosion occurred at McCord 13, a gas well site leased by Energen from the Bureau of Land Management (BLM) on rural BLM land north of Farmington, in an area of the San Juan Basin called Glade Run. In July 2002, John Stapleton and his friends drove to McCord 13. Stapleton, driving with a suspended license, and not keeping a lookout, backed directly into Energen's wellhead, and he died in the resulting explosion. The explosion was an isolated incident. Despite over 50 years of natural gas production in the San Juan Basin, no similar incident had occurred in the Basin or in New Mexico.

As with the vast majority of wellheads in Glade Run and the San Juan Basin, the McCord 13 wellhead was not fenced or barricaded. The liability portion of the trial focused on whether Energen

should have fenced the wellhead prior to the accident, and whether Stapleton was negligent. The jury returned a verdict in favor of Respondent, Stapleton's estate, awarding $2,957,00.00 in compensatory damages, which was reduced due to Stapleton's negligence by 35% to $1,922,050.00. Based on a finding of recklessness, the jury also awarded Respondent $13,000,000.00 in punitive damages. The ratio of punitive to compensatory damages awarded is 6.76 to 1.

This case presents two issues. First, does Due Process cap punitive damages at a ratio of 1:1 to compensatory damages, where substantial compensatory damages have been awarded, and the underlying award is based on recklessness, not fraud or malice? Implicit within this is the subsidiary question: Does Due Process create an irrebutable presumption of a maximum 1:1 ratio under these circumstances? Second, was New Mexico's appellate review of the punitive damages award constitutionally defective where its appellate court failed to conduct a *de novo* review and based its review on factors not relevant to petitioner's conduct? Both of these questions directly implicate the considerations for the grant of certiorari in Supreme Court Rules 10(b) and (c).

As to the first issue, review is warranted to create reasonable certainty as to the quantum of punitive damages to be awarded in cases involving substantial compensatory damage awards. This Court has twice recently suggested that where substantial compensatory damages have been awarded, the Due Process clause caps punitive damages at a 1:1 ratio. In *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), this Court stated: "When compensatory damages are substantial, then a lesser ratio, perhaps

only equal to compensatory damages, can reach the outer most limit of the due process guarantee."

In *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), this Court determined that a 1:1 ratio of punitive to compensatory damages is the upper limit in federal maritime cases. In the process, this Court described the ratio calculus as "a central feature in our due process analysis." *Id.* at 2629. The Court in *Baker* relied, in large part, on the median ratio identified by a comprehensive analysis of verdicts. Like this case, *Baker* involved conduct that was worse than negligence, but not malicious.

Since *Campbell*, this Court has not reviewed the approach that courts should take with respect to punitive damages awards involving personal injury claims where the alleged conduct was worse that negligent, but less than malicious. Since *Baker*, lower courts have diverged widely on the issue of whether to apply the 1:1 ratio to non-maritime cases. State and Federal courts, struggling over the meaning of *Campbell* and *Baker*, have come to differing conclusions. In this case, the New Mexico Court of Appeals found that a ratio of 6.76 to 1 was acceptable because it was less than 9 to 1. By contrast, in *Jurinko v. Medical Protective Co.*, 2008 WL 5378011, at *1, 10-13 (3rd Cir. 2008) (unpublished), a case involing a bad faith claim against a medical malpractice insurer, the court determined that the appropriate ratio is 1:1. Further, in *Hudgins v. Southwest Airlines Co.*, ___ P.3d ___, 2009 WL 73251, *13-17 (Ariz. Ct. App. Div.1, Dept. C 2009), a case involving the wrongful arrest and detention of bounty hunters who carried their weapons onto a commercial flight, the court determined that Due Process limited the punitive damages to a ratio of 2:1.

And in *Hayduk v. City of Johnstown*, 580 F.Supp. 2d 429, 483 n. 46 (W.D.Pa. 2008) the court wrestled with the impact of *Baker* and *Campbell* on a claim under 42 U.S.C. §1983 and concluded that *Baker* did not limit punitive damage awards to the amount of compensatory damages. Accordingly, guidance is required regarding the application of the ratio guidepost in tort cases involving isolated accidents

Review is also warranted for a second, separate reason: to provide guidance as to the proper application of this Court's reprehensibility guidepost. The New Mexico Court of Appeals did not perform *de novo* review of the punitive damages award, as required by this Court's precedent. It compounded this error by relying on considerations not related to Petitioner's conduct to uphold the punitive damages award: the serious harm suffered by Stapleton and one incident involving Petitioner's sister-subsidiary, Alabama Gas Company, whose operations are limited to Alabama. Guidance is required regarding the meaning and application of *de novo* review of large punitive damages awards.

A. Factual Background.

Petitioner Energen Resources Corporation is a natural gas and oil exploration and production company that operates in several states. It is a subsidiary of Energen Corporation. Energen Corporation's other subsidiary is Alabama Gas Company ("Alagasco"), a local natural gas distribution company in Alabama.

In 1997, Petitioner purchased approximately 1,000 natural gas wells in the San Juan Basin, an area comprising more than 20,000 natural gas wells. One of those wells was McCord 13, which is located north

of Farmington in Glade Run, a 33,800 acre trail system overseen by the BLM. Glade Run is typified by sandy arroyos, slick rock, rolling terrain, and sparse vegetation.

McCord 13 is in the southern portion of the Glade, in an area that BLM has designated as an Off-Highway Vehicle Area ("OHV"). The OHV designation means that the public, which already had unrestricted, lawful use of the access roads to McCord 13, could also enjoy off-road vehicle use in Glade Run, including land around Energen's facilities. The equipment at McCord 13 includes a wellhead (approximately 6 ½ feet tall and 4-5 feet wide), a separator, a liquids tank, and a meter house. Like more than 90% of the more than 400 natural gas wells in Glade Run, the McCord 13 wellhead was not fenced-off or barricaded at any point prior to the accident. The wellhead was painted red and stood approximately 66 feet from any other structures at McCord 13. Thus, someone driving through the well site would have approximately 10-12 car widths of open space between the wellhead and the other structures.

On July 21, 2002, John Stapleton and some friends were in the Glade Run. The group found their way onto the McCord 13 well site. At McCord 13, Stapleton asked Cody Amezcua, a friend, if he could drive his car. He drove the car past the wellhead, stopped at some point, and drove in reverse at a high rate of speed. Stapleton struck the wellhead with the rear corner of the car, causing an explosion which engulfed the car in flames. Both Stapleton and his passenger died as the result of their burn injuries.

Stapleton's accident was the first of this nature in Glade Run or the San Juan Basin. For more than 50

years, dating back before the 1960s, there is no record of anyone striking a wellhead with a vehicle and causing an explosion. The BLM did not require owners and operators of the wellheads in San Juan Basin to fence wellheads; in fact, fencing or barricading required BLM's permission. Thus, some were located inside fenced enclosures and others were not. Respondent introduced evidence that of the twenty-three wells in the OHV near McCord 13, fourteen were fenced-in and nine were not. Energen's wells followed a similar pattern. McCord 13 was among the wells that did not have a fence.

B. Proceedings Below.

The parties tried this case in the First Judicial District Court, State of New Mexico, starting on November 27, 2006, for six days. In his opening statement, Respondent's attorney relied on two incidents involving Alabama Gas Company to demonstrate that Energen knew that a vehicle coming into contact with a pressurized natural gas system could cause natural gas to ignite, and possibly a death. (App. H, p. 84a-88a) Energen had moved in limine to exclude this evidence, but the court denied the motion. At the close of Respondent's case, Energen moved for a directed verdict on punitive damages. Energen argued that Respondent did not satisfy the New Mexico punitive damages standard and that the reprehensibility guidepost would not support any punitive damages award. The court denied the motion. (App. E, p. 32a-33a)

The jury returned a verdict in favor of Respondent and awarded him $2,957,00.00 in compensatory damages. (App. C, p. 28a) The jury also found Stapleton 35% at fault, which reduced damages to $1,922,050.00. (App. C, p. 28a-29a) The jury also

determined that Energen was reckless, which authorized an award of punitive damages. It awarded Respondent $13,000,000.00 in punitive damages, one of several amounts referred to by Respondent's counsel during closing arguments. (App. C, p. 29a)

Energen protested the punitive damages award in a post-trial motion seeking a new trial, or in the alternative, remititur, arguing that it was unconstitutionally excessive. (App. F, p. 34a-67a) The court denied this motion. (App. E, p. 32a-33a) Energen then appealed to the New Mexico Court of Appeals, seeking review of the punitive damages award and other issues related to the trial. On September 22, 2008, the Court of Appeals issued an opinion upholding the punitive damages award, which is the reason for this Petition. (App. A, p. 1a-24a)

The court first determined that the ratio of punitive to compensatory damages was not unconstitutionally excessive because it was a single-digit multiplier and Petitioner's conduct was on the high end of the reprehensibility scale. With respect to this ratio, the Court of Appeals stated, in relevant part:

> In *Campbell*, the United States Supreme Court specifically declined to impose a bright-line ratio that a punitive damages award cannot exceed. *Campbell*, 538 U.S. at 425. While stating that "[s]ingle-digit multipliers are more likely to comport with due process," *id.*, the Court also acknowledged that a single-digit multiplier does not necessarily establish an appropriate limitation on a punitive damages award in egregious cases. *Id.* In recognizing these principles, our own Supreme Court has stated that the test under this prong of *BMW* is that "[t]he amount of an award of punitive damages must not be so

> unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Chavarria*, 2006-NMSC-, ¶ 38 (quoting *Aken*, 2002-NMSC-021, ¶ 23).

(App. A, p. 1a-20a) After noting that there was no argument or evidence that the jury disregarded the trial court's instruction concerning punitive damages, the Court of Appeals continued:

> Given that Defendant's conduct was on the high end of the reprehensibility scale, that the Decedent suffered excruciating pain, and intangible difficult to measure, that Decedent died, and that Decedent was only nineteen years old when he died, we conclude that neither ratio, both of which are single-digit ratios (6.76 to 1 or 4.4 to 1), exceeds the constitutional limits in this case. (App. A, p. 20a) (citations omitted)

Regarding the second issue, the Court of Appeals described the standard of review as follows:

> In our analysis of [the *BMW*] factors, our review of the record is de novo. *Bogle*, 2005-NMCA-024, ¶ 33; *Aken*, 2002-NMSC-021, ¶¶ 18, 19. ***However, our review is not truly de novo review.*** Our task is limited to determining whether the amount of the award is grossly excessive and therefore within or beyond the outer limits of due process. In this de novo review we do not ourselves determine the actual award of punitive damages. Thus, we preserve the constitutional right of the parties to have the jury decide the case, while at the same time performing our constitutional duty to insure that the award does not violate due process. *See Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 36, 140

> N.M. 478, 143 P.3d 717 (stating that appellate review of the amount of a plaintiff's punitive damages award is essentially a review for reasonableness). Moreover, in our review of the *BMW* factors, any doubts we may have "concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict." *Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, ¶ 23, 136 N.M. 701, 104 P.3d 1092 (quoting *Aken*, 2002-NMSC-021, ¶ 19).

(App. A, p. 16a) (emphasis added). Regarding the reprehensibility guidepost, the Court of Appeals correctly stated that the Petitioner's conduct was the most important indicator of the reasonableness of the punitive damages award and that it applies this guidepost apart from Stapleton's injury. Despite this recitation of governing standards, the Court of Appeals relied on: (1) the harm suffered by Stapleton; (2) evidence of two accidents involving Alabama Gas Company, a non-party, conducting entirely different operations in a different state; (3) its finding that Petitioner's conduct was repetitive, despite the fact that undisputed evidence established that no incidents of this nature occurred in the past. The court stated, in relevant part:

> We conclude that Defendant's conduct in this case was sufficiently reckless to support a substantial award of punitive damages. Defendant knew that there was a hazard of someone colliding with the wellhead, knew that if that happened serious bodily harm or death could result, knew that the well site was in a highly traveled area, knew that erecting a barricade or fence would prevent the hazard, and still chose to

not barricade the well site. As a result, when nineteen-year-old Decedent accidentally backed his car into Defendant's unprotected wellhead, the wellhead exploded, and Decedent burned to death at the scene after running from the car with his body on fire. Testimony from a burn care expert is that burning to death, as Decedent did in this case, is one of the most horrific ways to die.

Out of the five categories of conduct that we are to consider, two are not applicable: whether the target of the conduct had a financial vulnerability and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. The remaining three categories of conduct we consider all weigh in favor of finding that Defendant's conduct was outrageous to such a degree as to warrant significant punitive damages. Defendant's conduct resulted in excruciating physical harm and death. Additionally, Defendant's conduct was repetitive: it failed to act despite knowledge from a prior incident at a sister company that a vehicle coming into contact with a pressurized gas system, like a wellhead, could kill someone. Finally, for five years, from the time it acquired its wellheads in 1997 until the accident in 2002, it took no action to protect wellheads, despite its knowledge that excruciating physical harm and death could result by its inaction. Thus, Defendant's conduct evinced, in a non-isolated manner, indifference and reckless disregard for the safety of the public.

(App. A, p. 17a-18a) Noticeably absent from this analysis is any acknowledgement of the fact that there is no record of any similar injury involving a

vehicle and a wellhead other than the one at issue, and that the so-called repetitive conduct involved not Energen but its sister subsidiary, and involved out-of-state conduct that injured non-parties. Subsequent to this decision, Energen sought review by the New Mexico Supreme Court, which denied Energen's request on November 6, 2008.

REASONS FOR GRANTING THE PETITION

The New Mexico Court of Appeals' decision as to the quantum of punitive damages is contrary to this Court's decisions in *Campbell* and *Baker*. There is substantial inconsistency and confusion amongst the Federal and state courts concerning the quantum of punitive damages that are permissible under the Due Process clause of the Fourteenth Amendment. This confusion compounds the already "stark unpredictability" of punitive damage awards. *Baker* at 2825. This unpredictability means that in almost every case where punitive damages are at issue, neither the defense lawyers nor their clients can realistically assess their exposure. This unpredictability is like a joker in the deck. Although this Court has heretofore declined to establish bright line tests under a due process analysis, this case presents the perfect opportunity for it to do so, particularly given the Court's recent decision in the maritime context in *Baker*. Energen asks this Court to grant certiorari and, after full briefing, issue a decision which holds that where substantial compensatory damages have been awarded and the defendant's conduct is less than malicious but worse than negligence, the ratio of punitive damages to compensatory damages cannot exceed 1:1.

The decision of the New Mexico Court of Appeals as to the nature and extent of the review it is required

to conduct is inconsistent with *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001). Instead of conducting a true *de novo* review, the court limited its role to determining whether the award exceeded the 9:1 ratio that it thought this Court imposed as the outer bounds that Due Process would tolerate. It is important for this Court to set out clearly the nature and extent of the *de novo* review required by *Cooper Industries*, because it is an essential ingredient of Due Process. The New Mexico court's failure to conduct searching *de novo* review in this case is evident. In finding Energen's conduct to be particularly reprehensible, the court improperly focused on the harm to Stapleton, disregarded the 50-year history of well operation in the San Juan Basin, and blamed Energen for the out-of-state conduct of its sister subsidiary.

As a remedy, Energen asks this Court to grant certiorari and, after full briefing, issue a decision holding that (1) all appellate courts reviewing punitive damages must do so *de novo* and (2) in cases where compensatory damages are substantial and the alleged conduct is greater than negligent but less than malicious, punitive damages be limited to a range of 0:1 to 1:1. This approach will enable this Court to avoid the day-to-day quagmire of sorting out the proper ratios in cases of this nature. The imposition of a mechanical 1:1 cap would not be a sufficient remedy. Rather, appellate courts must be instructed to examine the record carefully, apply the now well-articulated factors and decide *de novo* where in the range from zero to a sum equal to compensatory damages is the appropriate measure for punitive damages. Much of the mischief that now accompanies punitive damages litigation could be ended if appellate courts were required to conduct

this kind of careful *de novo* review. It is time for the Court to rein in the chaos and impose the rule of law mandated by the Due Process clause.

A. The Court Should Grant Certiorari To Decide Whether, In Cases Where Compensatory Damages Are Substantial, A 1:1 Ratio Is The Constitutional Maximum.

In *Campbell*, with respect to the ratio guidepost, this Court observed that the reasonableness of any punitive damages award is "based on the facts and circumstances of defendant's conduct and the harm to plaintiff." *Campbell*, 538 U.S. at 425. As a result, this Court has been "reluctant to identify a concrete constitutional limit on the ratio ...." *Id.* at 424. That being said, this Court determined that "few awards exceeding a single-digit ratio between punitive and compensatory, to a significant degree, will satisfy due process." *Id.* at 425. With respect to "substantial" compensatory damage awards, this Court stated that a "lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* This Court regards $1,000,000.00 as a substantial award. *See id.* at 426.

Both the New Mexico Court of Appeals and the New Mexico Supreme Court have latched onto *Campbell's* reference to a single-digit ratio, resulting in a weak application of the ratio guidepost. Their decisions apply the ratio guidepost bluntly, i.e., if the ratio is 9:1 or lower, the reviewing court accepts the award as constitutional under this prong. *See Chavarria v. Fleetwood Retail Corporation*, 140 N.M. 478, 490, 143 P.3d 717, 729 (N.M. 2006); *Littell v. Allstate Insurance Company*, 143 N.M. 506, 521, 177 P.3d 1080, 1095 (N.M. Ct. App. 2007); *Bogle v. Summit Investment Company, LLC*, 137 N.M. 80, 91-

92, 107 P.3d 520, 531-32 (N.M. Ct. App. 2005); *Atler v. Murphy Enterprises, Inc.*, 136 N.M. 701, 708-09, 104 P.3d 1092, 1099-1100 (N.M. Ct. App. 2004). The *Littell* decision, which is most recent, stated, "Here, the ratio of punitive damages to compensatory damages is 3.6 to 1. This is within the range deemed by the Supreme Court to be consistent with due process. 117 P.3d at 1095. Similarly, the *Atler* court stated, "In this case, the award was within the constitutional parameters indicated by the Supreme Court." 104 P.3d at 1100. Neither *Littell* nor *Atler* courts provided further explanation.

The absence of meaningful analysis by New Mexico courts strips the ratio guidepost of its value. New Mexico courts apply it bluntly because they do not know what this Court regards as the correct approach. In *Bogle*, the court of appeals observed a "general lack of guidance on what constitutes an appropriate ratio between compensatory and [punitive] damages ...." 107 P.3d at 532. Since *Bogle*, the New Mexico Supreme Court has not provided any meaningful guidance, and this Court provided guidance only recently, in *Baker*.

Baker significantly altered the framework of this analysis by suggesting a 1:1 ratio as the upper limit in cases arising under similar facts, involving substantial compensatory damages and conduct worse than negligent but less than malicious. *Baker*, 128 S. Ct. at 2633. *Baker* was "a case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury." *Id.* at 2631-32. Although *Baker* arose under federal maritime law, this Court in *Baker* described the ratio calculus as "a central feature in our due process analysis," *Id.* at 2629, and twice emphasized its statement in

Campbell that when compensatory damages are substantial, a 1:1 ratio may be the constitutional limit. *Id.* at 2626, 2634. The evolution of this Court's Due Process analysis thus points to a maximum 1:1 ratio in cases involving substantial compensatory damages.

The instant case falls within *Baker's* analytical framework, both factually and as a matter of policy. The jury determined that Energen was reckless. There was no allegation or finding that Energen's conduct was malicious or fraudulent. The Court of Appeals did not accept or adopt Respondent's allegation that Energen had a profit motive. In fact, there was little motive; the only cost at issue was the cost of erecting a fence, which was negligible. (App K. p. 107a-108a) Finally, and most importantly, Respondent's compensatory damage recovery was substantial—nearly $2 million—reflecting the substantial harm suffered by Stapleton. The punitive damages award was 6.76 times larger than Respondent's compensatory damages.

This case thus presents policy issues similar to *Baker*. In *Baker*, this Court explained.

> The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not. A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a

> mean ration of 2.90:1 and a standard deviation of 13.81. Juries, Judges, and Punitive Damages 269. Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories.

128 S.Ct. at 2625. New Mexico state jury trials follow a similar trajectory, with this case as an outlier. *See e.g., Littel*, 177 P.3d at 1095 (ratio of 3.6:1); *Atler*, 104 P.3d at 1099 (ration of 3.79:1); *Aken v. Plains Elec. Generation and Transmission Co-op, Inc.*, 49 P.3d 662, 671-73 (N.M. 2002) (ration of 3:1); *Allsup's Convenience Stores, Inc. v. The North River Insurance Company*, 976 P.2d 1, 18 (N.M. 1998) (ratio of 7.4:1 and 1.59:1).

This case presents an opportunity for the Court to decide whether to expand its holding in *Baker* to all punitive damages cases of this nature–greater than negligence and less than malicious, especially as they relate to isolated accidents. The award in this case is based upon a common law finding, not a statutory provision (such as an unfair and deceptive trade practices act). Importantly, it would provide courts guidance on how to apply *Baker's* analysis regarding the ratio guidepost. As it stands now, lower courts are at odds on this point. *Compare Security Title Agency Inc. v. Pope*, 2008 WL 2895939, *17-24 (Ariz. App. July 29, 2008) (citing both constitutional cases and *Baker* in reducing $35 million punitive damage award to $6.1 million, an amount equal to compensatory damages) and *Adidas America, Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, *13-16 (D. Or. Sept. 12, 2008) (citing both constitutional cases and *Baker*, court reduced $137 million punitive damage

award to $30.6 million—an amount equal to compensatory damages—and then further reduced punitive damages based on other factors) with *American Family Mutual Insurance Company v. Miell*, 569 F.Supp.2d 841, 858-59 (N.D.Iowa 2008) (rejecting the 1:1 ratio imposed by *Baker* and upholding a ration of 1.85:1 where conduct involved substantial trickery) and *Kunz v. DeFelice*, 538 F.3d 667, 678-79 (7th Cir. 2008) (rejecting a 1:1 ratio)[1]. The Court should take this opportunity to determine finally that in cases where compensatory damages are substantial, and there is no malice or fraud at issue, the constitutional maximum ratio of punitive to compensatory damages is 1:1.

B. The Court Should Grant Certiorari To Insist On True De Novo Review Of The Relevant Reprehensibility Factors.

The New Mexico Court of Appeals' fundamental error was in misunderstanding its role and failing to provide *de novo* review. Instead of conducting a true *de novo* review, the court said:

> In our analysis of these factors (*BMW*), our review of the record is de novo. **However our review is not truly de novo**. Our task is limited to determining whether the amount of the award is grossly excessive and therefore within or beyond the outer limits of due process. Thus we preserve the constitutional right of the parties to have the jury decide the case, while at

[1] The rejection of *Baker* in *Kunz*, which involved a § 1983 action does not foreclose the application of *Baker*'s limitation to cases involving the type of conduct for which Energen was found liable, greater than negligent but less than malicious. A § 1983 action involves and element of willfulness.

> the same time performing our constitutional duty to insure that the award does not violate due process.

(App. A, p. 16a) (internal citations omitted) (emphasis added).

The court's suggestion that a jury must decide the quantum of punitive damages subject to only loose review of the outer limits of Due Process is incorrect. As this Court noted in *Cooper Industries*, 522 U.S. at 437-440, there is no Seventh Amendment right to have a jury determine punitive damages, and the jury's award is not a finding of fact. *De novo* appellate review of punitive damages requires the expertise of appellate courts.

De novo review requires reviewing courts to accept the factual findings of the trial court, unless clearly erroneous but then to conduct a true independent review of the punitive damages award. *Id. at* 435-36. In this case, the trial court made one finding, that Energen was reckless. Neither the jury nor the judge made further findings. Thus, little restricted the Court of Appeals' ability to review the record independently. Despite this, the court accepted Respondent's version of the evidence entirely, without reference to factors weighing against reprehensibility. In doing so, the court relied on inappropriate evidence of reprehensibility, evidence that a *de novo* review would have isolated and disregarded.

The importance of independently reviewing the reprehensibility of a defendant's conduct cannot be overstated. It is the most important component of this Court's due process analysis:

> "[T]he most important indicium of the reasonableness of a punitive damages award is the

> degree of reprehensibility of the defendant's conduct." *Gore,* 517 U.S., at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.*, at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. *Campbell*, 538 U.S. at 419. *Id.*, at 575, 116 S.Ct. 1589.

In evaluating these factors, the Court of Appeals cited three circumstances in support of its reprehensibility determination: (1) Stapleton suffered "excruciating physical harm"; (2) Energen's conduct was repetitive; and (3) Energen knew that physical harm and death could result from its failure to erect a fence or barricade around the wellhead. These circumstances do not differentiate this case from *Baker*.

First, the fact that Stapleton suffered "excruciating physical harm" and died in a "horrific" way is not relevant to reprehensibility. Only whether harm is characterized a physical as opposed to economic is a factor, not the type or extent of a plaintiff's physical harm. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). Based upon trial testimony, the

jury apparently awarded Respondent's compensatory damages primarily for economic losses. (App. J, p. 93a-106a) Yet the New Mexico Court of Appeals plainly allowed the type of Stapleton's injuries and the manner of his death to play a determinative role in its reprehensibility analysis. This Court should clarify how reviewing courts should apply this factor, i.e., whether courts should consider the type and scope of physical injuries, and whether courts should consider the relative amounts of economic versus non-economic damages.

Second, Energen's conduct was not repetitive. There is no evidence that an incident of this nature had ever occurred in the Glade Run or the San Juan Basin. Prior to this incident, approximately 2.5 million vehicles have driven past well sites in Glade Run and had never come into contact with a wellhead causing an explosion. There is no indication in its decision that the Court of Appeals considered this evidence.

The Court instead relied on incidents involving Alabama Gas Company. But the Alabama accidents were not an appropriate basis for concluding that Petitioner's conduct was repetitive. Alabama Gas Company was not a defendant. It is a sister subsidiary whose very different operations are limited to Alabama. Thus, these events involved non-parties in a different jurisdiction. (App. H, 87a, 89a-92a)

Additionally, the accidents were fundamentally dissimilar. The 1983 accident in Hoover, Alabama, for example, occurred when a vehicle collided with a house, rupturing a small-residential natural gas service regulator. Here, the wellhead in this case was 6 feet tall, weighing approximately 1,300 pounds, painted red and located in a rural area. There was

no evidence that Alabama Gas Company's conduct was unlawful. Respondent has maintained that the Alabama accidents put Energen on notice that a vehicle impacting a wellhead could cause an explosion. The Court of Appeals erroneously accepted this proposition. *Campbell* is clear on this point:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

538 U.S. at 422, citing *Gore*, 517 U.S. at 572-73.

After *Campbell*, in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), this Court even more plainly stated that a reviewing court may not subject a defendant to punitive damages due to harm suffered by nonparties:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.

Williams, 127 S. Ct. at 1063. Under these circumstances a defendant would be deprived of the opportunity to defend itself. *See id.*

The incidents involving Alabama Gas Company did not include any conduct by Energen; thus, it is even

further removed from harm to nonparties than the defendant in *Williams*. The Court of Appeals wrongly placed Energen in Alabama Gas Company's shoes. Additionally, there was no evidence that the Alabama accidents involved unlawful conduct or that the absence of a fence or barricade is unlawful in the Glade Run. The accidents involving Alabama Gas Company were not evidence of repetitive conduct.

Third and finally, Energen did not have knowledge that an injury of this nature was likely to occur. Again, no such incident had ever occurred. The ease with which the Court of Appeals reached its conclusion is somewhat surprising considering the difficulty that other state courts have had in establishing whether a duty even existed in cases involving vehicles striking utility poles. *See* 51 A.L.R. 4th 602; *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St. 3d 215, 887 N.E.2d 1158 (2008)(utility company has no liability for the collision of a car and a utility pole placed outside the roadway if the utility had permission to place the pole); *Afarian v. Massachusetts Electric Co.*, 449 Mass. 257 (2007)(utility company has no duty to driver impaired by alcohol who leaves a road and strikes a pole). The Court of Appeals observed that "for five years, from the time it acquired its wellheads in 1997 until the accident in 2002, [Energen] took no action to protect wellheads, despite its knowledge that excruciating physical harm and death could result by inaction." But it never discussed the likelihood that such incident *would* result, in light of the placement of the wellhead, its markings or characteristics (e.g., 6 feet tall and 4-5 feet wide, painted red), the extent of use of McCord 13 (especially near it), or the fact that it was in the OHV area as opposed to adjacent to a state or inter-state highway (for example).

Review is therefore warranted to correct the New Mexico Court of Appeals's errors as to the scope of review required by Due Process. This would provide this Court an opportunity to clarify the nature of *de novo* review, especially where essentially no findings of fact exist, and would allow the Court to refine the reprehensibility guidepost as it relates to torts involving physical harm.

CONCLUSION

Energen asks this Court to grant a writ of certiorari to resolve the important constitutional questions concerning the Due Process limits on the quantum of punitive damages and the Due Process requirements for *de novo* appellate review of punitive damages awards.

Respectfully submitted,

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February 4, 2009

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

[Filed September 22, 2008]

Opinion No. ____
No. 27,489

VAL JOLLEY, Personal Representative of the
Estate of JOHN EVERETT STAPLETON, deceased
Plaintiff-Appellee,

v.

ENERGEN RESOURCES CORPORATION,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
James A. Hall, District Judge

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for Appellant

OPINION

VIGIL, Judge.

(1) Plaintiff is the personal representative of the estate of her son (Decendent).In this wrongful death case the jury awarded Plaintiff $2,957,000 in compensatory damages, which was reduced to $1,922,050 based on a finding that Plaintiffs decedent was 35 percent negligent and Defendant was 65 percent negligent. The jury also awarded Plaintiff $13,000,000 in punitive damages. We affirm.

BACKGROUND

(2) On Sunday, July 21, 2002, after recreating in the Glade Run Recreation Area (Glade Run Area) on Bureau of Land Management (BLM) land just north of Farmington, Decedent backed up the vehicle he was driving to turn around and return to Farmington. He backed into an unfenced, unprotected natural gas wellhead operated by Defendant, identified as the McCord 13 well. The wellhead exploded, and Decedent burned to death at the scene after running from the vehicle with his body on fire. Plaintiffs suit for wrongful death asserted that Defendant was negligent in that Defendant failed to exercise ordinary care to protect its exposed natural gas wellhead at McCord 13 from contact with motorized vehicles, Plaintiff also contended that Defendant's conduct was so reckless as to justify an award of punitive damages. The jury heard and considered the evidence following a six-day trial in which twenty-eight witnesses testified, and in which numerous documents, photographs, maps, and stipulations were admitted into evidence.

(3) Defendant acquired the McCord 13 well in 1997, along with approximately one thousand other

natural gas wells in the San Juan Basin. The Glade Run Area where McCord 13 is located consists of sandy arroyos, slick rock, rolling terrain, and sparse vegetation and had been used for years for outdoor recreation. In 1988, the BLM designated the 33,800 acre Glade Run Area as a Recreation Management Area; and in 1996, the BLM designated the southern part of the Glade Run Area adjacent to Farmington as open for off-road vehicle use. Before the explosion at McCord 13, Defendant knew that it would be hazardous if a vehicle came into contact with a pressurized natural gas system, like a wellhead, and that it could kill someone. Notwithstanding this knowledge, Defendant did not erect any new fences or barricades around its unprotected wellheads. On the other hand, other natural gas companies operating in the Glade Run Area did erect fences and barricades around their natural gas wellheads near McCord 13 from as early as 1993 until the fall of 2001

(4) A San Juan Deputy Sheriff testified that during his regular patrols of the Glade Run Area in the summer of 2002, he observed a fair, "almost substantial" amount of vehicular traffic pass through the middle of the McCord 13 well site, particularly on weekends. He added that he often saw young people parking in the area of the well because it was a "scenic view spot"

(5) The opinion of Defendant's general manager was that a barrier should have been put up around the wellhead to protect motorists who parked at the well and turned around to head back to Farmington. He also recognized that someone could back a vehicle into a wellhead and that an unprotected well head was a hazard. He conceded that Defendant should have done a risk assessment, and he admitted that

the more serious the risk posed, the more likely it was that Defendant should have taken action. Backing into a wellhead and being killed was "the most serious risk" he could envision. He candidly told the jury that he should have been aware of teenagers parking at McCord 13 and fenced the wellhead.

(6) From the time it made its acquisition in 1997 until the explosion in 2002, Defendant did not have a program to assess the risk associated with its well sites, and it had no discussions about fencing or barricading any of the wells in the Glade Run Area. Furthermore, Defendant had no published policy addressing safety at its well sites during this time. This was due to its "bottom-up" safety program, which placed the burden of safety on lower-level, employees. Consequently, the operator who took care of McCord 13 and the equipment on a daily basis was also the person responsible for making safety recommendations concerning the well site. The operator knew that another wellhead he serviced, which was owned by Defendant just north and west of McCord 13, was protected with a pipe barricade; he knew that the purpose of this barrier was to keep trucks from running into the wellhead; and he recognized that if a vehicle ran into a wellhead, it could kill someone. On multiple occasions when the operator serviced McCord 13 before the explosion, he observed new tracks indicating that traffic had passed on both sides of the wellhead. However, Defendant did not provide him with any guidance for making safety recommendations, tell him anything about its policies and procedures to protect the public, or ask him to give recommendations about whether new fences or barricades were needed at any of its well sites.

(7) Plaintiffs oil field safety expert testified that it was his opinion that Defendant's conduct was both below the standard of care for the industry for an oil and gas operator and was reckless: (1) by failing to fence or barricade the McCord 13 site, (2) by failing to have a hazard analysis program, (3) by failing to have a top-driven safety policy, and (4) by failing to have a safety manual at the time of the explosion.

(8) The jury found that Defendant was negligent and determined that Plaintiff's i total compensatory damages were $2,957,000. Since the jury also found that Decedent was 35 percent comparatively negligent, the compensatory damages award was reduced to $1,922,050. The jury also determined that because Defendant's conduct was reckless, punitive damages were warranted. The jury adjudged that an award of punitive damages in the amount of $13,000,000 was appropriate to punish Defendant and to deter others from engaging in similar reckless conduct. Defendant's total assets are $2.6 billion; the amount of punitive damages assessed is one-half of one percent (0.5%) of its assets.

(9) Defendant appeals, arguing that (1) misconduct by Plaintiff's counsel during closing argument requires reversal and (2) the punitive damages award is unconstitutionally excessive.

I. CLOSING ARGUMENT OF PLAINTIFF'S COUNSEL

(10) Defendant argues that the trial court abused its discretion in failing to grant a mistrial or new trial because improper arguments of Plaintiff's attorney in closing arguments to the jury deprived Defendant of a fair trial. The arguments that Defendant complains of fall into two categories: (A) viola-

tions of the trial court order excluding post-accident remedial measures and (B) improper "Golden Rule" arguments.

A. Post-Accident Remedy Arguments

(11) The trial court granted Defendant's motion in limine and directed that unless Defendant argued at trial that fencing and barricading wellheads was not feasible, neither party was permitted to present evidence to the jury that, after the accident, Defendant fenced and barricaded McCord 13 and other wellheads in the area. Defendant argues on appeal that Plaintiff's counsel violated the order four times in his closing arguments to the jury.

(12) While arguing liability, Plaintiff's counsel said:

> The [Bureau of Land Management] requires [Defendant] to protect the public if they're going to take all the public's oil and gas and make billions of dollars from it, That is the agreement that they adhered to. They signed that agreement. That agreement is in evidence. You can look at it.
>
> Now, the clear answer is, should they have fenced? Should they have fenced, based on everything you know at this point? I think the answer is, clearly, yes, they should have.
>
> Were they negligent? Yes, they were. They didn't have the proper programs in place. They didn't do all their homework with respect to preparing their documents. *They, frankly, did not take safety seriously, and they don't today.*

(Emphasis added.)

(13) Turning to punitive damages, Plaintiffs counsel argued:

> [T]he civil jury has an opportunity to correct wrongdoing in society in the civil matter. How do you do that? You have to impose a fine. Especially, with a corporation.
>
> Now I understand, if we're talking about an individual who might be making a few dollars a year, well, the fine doesn't have to be very big to learn their lesson. But that's not the case here, and I want to talk to you about it. Corporations work by profit and loss. Their conduct does not change, absent correcting economic circumstances. And correcting economic circumstances means you have to affect the bottom line before a corporation reacts. They just don't do it to be good citizens, because we know that in this case. We know they haven't done it. *Even as of today, we know they haven't done the right thing.* What we've got is an energy company and companies operating up there, taking the oil and gas, without the appropriate protections.

(Emphasis added.)

(14) In arguing what would be an appropriate amount of punitive damages. Plaintiff's counsel then asserted:

> You want to get word to the boardroom? You want a change in conduct? This is how you do it. One-tenth of one percent . . . is $2,618,000. One-half of one percent is . . . $13,091,000. One percent, one percent—and I submit to you that when you start getting one percent, you might be getting there. You might be getting there. It's 26 million. It's a lot of money.

> But unless you are willing as a group, as a jury, to accept the responsibility of the social change that comes from making a tough decision like this, and imposing that kind of fine on them, you will not save any of the children of New Mexico or any of those children up there in Farmington. *You will not get them to fence anything, because they won't do it absent the economic stimulus.* That's just the way it works.

(Emphasis added.)

(15) There were no objections to the foregoing arguments at the time they were made. Defendant waited until Plaintiff's counsel completed his closing argument, and the court recessed before objecting. During the recess, Defendant objected to the closing argument and requested a mistrial, claiming that "on two different occasions just now in [counsel's] closing argument, he made reference to corrective—or the absence of corrective action supposedly not taken by this Defendant after the accident" Defendant also requested that the jury be instructed that McCord 13 was fenced within two weeks of the accident. Plaintiffs counsel responded that the argument was not improper because there was evidence, introduced by Defendant, that wells were present in the area that were not fenced.

(16) The trial court determined that the statements were improper, but denied Defendant's motion for a mistrial. The trial court also declined to instruct the jury that McCord 13 was fenced after the accident. Instead, it instructed the jury:

> In [Plaintiffs counsel's] arguments, on at least one occasion, he made reference to the idea that no corrective action had been taken by [Defen-

dant] up to today. I want to state that there is no evidence before you on that issue as to what, if any, corrective action was taken. And I am instructing you that you must disregard that portion of [Plaintiff's counsel's] argument"

(17) In rebuttal closing argument, after the jury was given the instruction, Plaintiff's I counsel said:

> You know, their argument is that [Decedent] was drinking.
>
> . . . Now, you talk about me mentioning something that's not in evidence. I mean, what evidence is there of that? There is absolutely none. But that's the whole purpose here. What I say is not evidence. What [defense counsel] says is not evidence. You have to rely on your memory about what the evidence is, and rely on that.

Plaintiff's counsel then continued,

> Let me ask you something. When you go fill up your car with gas, you pull up to the pump, and you see those concrete barriers by the pump, and you see every one of them has a mark on them. Every one of them has a buff mark on it because somebody hit it. Sure. Did they hit it on purpose? No, they don't hit it on purpose. It's an accident. But we know, the service station operators know, the people that sell that gasoline know, that if you hit the pump, it could be dangerous. And they know that people make mistakes, just like [Defendant] knew that somebody could back into a wellhead. But what they did is they protect those well pumps, gasoline pumps, by putting a barrier there so that someone won't run into it and get hurt. *And that's what we're saying [Defendant] should have done, and that's what*

> *we're saying theyrefused to do, acknowledge, even as of right now.*

(Emphasis added.) Defendant made no objection to this argument at trial.

B. Golden Rule Arguments

(18) While discussing compensatory damages in his closing argument, Plaintiff's counsel also said:

> The value of life. You have to make a decision on what life is worth. What is life worth to live? It's a difficult thing to do. What you normally do is you look at how long you have yet to live, and the quality of your life. Now, [Decedent] was a young man, he had no health problems; and he had 55.4 years left to live. Now, when you reach the age of 60, 55, you start thinking, "Well, how much is the rest of my life worth? Would I give up my life in the next 20 years for a million dollars? Would I give it up for 2 million?" Boy, that's a tough decision. I can guarantee that most people wouldn't do it. And when you sit down to start thinking about what it's worth to be with your wife and children, what it' s worth to spend the holidays with the family, what it's worth to go on vacation, what it's worth to look at the birds[.]

(19) Defendant asked to approach the bench and objected, asserting that Plaintiff's counsel was making Golden Rule arguments by asking the jurors to determine what life would be worth to them. The trial court agreed and warned Plaintiff's counsel to use "general terms and not put the jurors, themselves, in the terms of the Plaintiff."

(20) Plaintiff's counsel continued with his argument and later said:

> Now, when you go to the funeral home, or when an individual goes to a funeral home, and you go and somebody's lost a relative. What's the first thing you tell them? You say, "I hope he didn't suffer. I hope he didn't suffer." Yeah. Because that's a very, very significant issue to a compassionate human being, that they not suffer.

(21) Plaintiff's counsel continued by describing the pain Decedent endured and details of his death, indicating that it took two minutes for him to burn to death. Plaintiffs counsel then stated, "At some point, just wait two minutes. Just sit there for two minutes and think of somebody suffering in that type of excruciating pain for two minutes. This is the most horrific death possible." Defendant made no objection to the comments in the preceding two paragraphs.

C. Post-Judgment Motion

(22) After judgment was entered, Defendant moved for a new trial, asserting that the closing argument of Plaintiffs counsel was improper and prejudicial. Defendant i asserted that in closing, counsel implied that Defendant had never fenced the well after the accident, violated the order in limine, commented dismissively on the trial court's admonition, continued to violate the order in rebuttal, and made prohibited "Golden Rule" arguments. Moreover, Defendant continued, because the trial court had rejected Defendant's request that the jury be informed that it had fenced the McCord 13 wellhead within two weeks of the accident, the jury was left with the false impression that Defendant still had not fenced it.

(23) At the hearing on the motion, the trial court expressed its belief that inferences could be drawn

from the closing argument of Plaintiff's counsel that were inconsistent with the ruling on Defendant's motion in limine; and specifically, "the argument that was made clearly inferred that there had been no action taken as to that well [McCord 13] even up to the time of trial." However, the trial court also determined that counsel did not intentionally violate its order on the motion in limine and that "the admonition that the court provided was adequate, and that the jury would follow that admonition and not consider those arguments in reaching their conclusion." The trial court further ruled that the Golden Rule arguments made by Plaintiff's counsel were "comparatively small." Defendant's motion was denied.

D. Analysis

(24) A motion to declare a mistrial is addressed to the sound discretion of the trial court, and our review is limited to determining whether that discretion was abused. *Transwestern Pipe Line Co. v. Yandell,* 69 N.M. 448, 460, 367 P.2d 938, 946 (1961), *superseded by statute on other grounds as stated in Santa Fe S. Ry. v. Baud's Ltd. Liab. Co.*, 1998-NMCA-002, ¶17, 124 N.M. 430, 952 P.2d 31. We also apply the deferential abuse of discretion standard in reviewing a trial court's decision on whether to grant a new trial due to improper arguments of counsel. *Enriquez v. Cochran,* 1998-NMCA-157, ¶131, 126 N.M. 196, 967 P.2d 1136. "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Newsome v. Farer,* 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). In this environment of discretion, a judgment may be reversed because of arguments of counsel only when (1) the argument is improper and (2) the appellate court is

satisfied that the argument was reasonably calculated to cause, and probably did cause, an improper verdict in the case. *See Benavidez v. City of Gallup*, 2007- NMSC-026, ¶16, 141 N.M. 808, 161 P.3d 853.

(25) The trial court instructed the jury that there was no evidence as to whether Defendant did or did not take corrective action after the accident and instructed the jury to disregard any portion of Plaintiff's arguments that might suggest that Defendant had not taken such corrective action. The trial court determined that these instructions were sufficient to cure any potential prejudice resulting from Plaintiffs arguments. We are satisfied that in making this determination, the trial court did not abuse its discretion.

(26) The pretrial order was that neither party was permitted to present evidence that after the accident Defendant fenced McCord 13 and other wells in the area. Both parties complied with the order, and no such evidence was offered by either party. On the other hand, there was evidence that when Defendant acquired its wellheads in the San Juan Basin in 1997, it did not erect fences or barricades around unprotected wellheads at that time, Furthermore, there was evidence that Defendant knew that people from Farmington recreated in the area where McCord 13 was operated; that a vehicle coming into contact with a pressurized natural gas system was hazardous and could kill someone; that, despite this knowledge, Defendant did not erect a fence or barricade around McCord 13; that another wellhead operated by Defendant near McCord 13 was protected by a pipe barricade; that other natural gas companies operating in the Glade Run Area did erect fences and barricades on wellheads near McCord 13; and that

Defendant's general manager admitted that Defendant should have fenced the wellhead at McCord 13.

(27) Only one of the statements complained of can be construed as a statement that as of the *present* time, Defendant had still failed to erect a barricade or fence around McCord 13. That is the statement, "We know they haven't done it. Even as of today, we know they haven't done the right thing." To be sure, this statement should not have been made. However, in assessing whether it was unduly prejudicial, we are reminded: "The trial judge is in a much better position [than we are on appeal] to know whether a miscarriage of justice has taken place and his opinion is entitled to great weight in the absence of a clearly erroneous decision." *Transwestern Pipe Line Co.*, 69 N.M. at 460, 367 P.2d at 946. We cannot conclude that the trial court's conclusion that this single comment did not deprive Defendant of a fair trial following a six-day trial in which twenty-eight witnesses testified and numerous 1 documents, photographs, maps, and stipulations were admitted into evidence is clearly erroneous.

(28) Furthermore, to the extent the comment could have been improperly construed by the jury as argument that Defendant failed to take any corrective action after the I accident, the instruction to disregard all arguments making any such suggestion was sufficient. "There is a presumption that the jury understood and complied with the court's instructions." *Vigil v. Miners Colfax Med. Ctr.*, 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct. App. 1994). With regard to the rebuttal closing arguments, which were not objected to when made, we conclude they were a fair comment on the evidence set forth above in ¶26, which was admitted. Finally, with regard to the

alleged Golden Rule arguments, the trial court warned Plaintiff's counsel to use general terms at the bench conference and, after the admonishment, there were no further objections by Defendant.

(29) We hold that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial or Defendant's motion for a new trial.

II. PUNITIVE DAMAGES AWARD

(30) The evidence was clearly sufficient for the jury to conclude that the conduct of Defendant was reckless and warranted an award of punitive damages, and Defendant does not argue otherwise. Defendant's argument is that the amount of punitive damages award is grossly excessive and therefore unconstitutional. *See Bogle v. Summit Inv. Co.*, 2005-NMCA-024, ¶33, 137 NM. 80, 107 P.3d 520 (recognizing that as stated in *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001), punitive damage awards that are "grossly excessive" violate the Eighth and Fourteenth Amendments to the United States Constitution).

(31) In considering on appeal whether a punitive damages award violates due process, we consider the factors set forth in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996). *Aken v. Plains Elec. Generation & Transmission, Coop., Inc.*, 2002-NMSC-021, ¶19, 132 N.M. 401, 49 P.3d 662. Those factors are:

> 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded

> by the jury and the civil penalties authorized or imposed in comparable cases.

Id. ¶20. In our analysis of these factors, our review of the record is de novo. *Bogle,* 2005-NMCA-024, ¶33; *Aken,* 2002-NMSC-021, ¶¶18, 19. However, our review is not truly de novo review. Our task is limited to determining whether the amount of the award is grossly excessive and therefore within or beyond the outer limits of due process. In this de novo review we do not ourselves determine the actual award of punitive damages. Thus, we preserve the constitutional right of the parties to have the jury decide the case, while at the same time performing our constitutional duty to insure that the award does not violate due process. *See Chavarria v. Fleetwood Retail Corp.,* 2006-NMSC-046, ¶36, 140 N.M. 478, 143 P.3d 717 (stating that appellate review of the amount of a plaintiff's punitive damages award is essentially a review for reasonableness). Moreover, in our review of the *BMW* factors, any doubts we may have "concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict." *Atler v. Murphy Enters., Inc.,* 2005-NMCA-006, ¶23, 136 N.M. 701, 104 P.3d 1092 (quoting *Aken,* 2002-NMSC-021, ¶19).

(32) First, we evaluate the degree of reprehensibility of Defendant's misconduct. "The United States Supreme Court has indicated that the degree of reprehensibility of a defendant's conduct is '[t]he most important indicium of the reasonableness of a punitive damages award.'" *Chavarria,* 2006-NMSC-046, ¶37 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419 (2003)). In evaluating this factor, we compare the damages to the enormity

of Defendant's wrong *apart* from the actual injury sustained. *Aken,* 2002-NMSC-046, ¶23. We consider five categories of conduct to determine reprehensibility. These are whether

> the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co., 538 U.S. at 419.

(33) We conclude that Defendant's conduct in this case was sufficiently reckless to support a substantial award of punitive damages. Defendant knew that there was a hazard of someone colliding with the wellhead, knew that if that happened serious bodily harm or death could result, knew that the well site was in a highly traveled area, knew that erecting a barricade or fence would prevent the hazard, and still chose not to barricade the well site. As a result, when nineteen-year-old Decedent accidentally backed his car into Defendant's unprotected wellhead, the wellhead exploded, and Decedent burned to death at the scene after running from the car with his body on fire. Testimony from a burn care expert is that burning to death, as Decedent did in this case, is one of the most horrific ways to die.

(34) Out of the five categories of conduct that we are to consider, two are not applicable: whether the target of the conduct had financial vulnerability and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. The

remaining three categories of conduct we consider all weigh in favor of finding that Defendant's conduct was outrageous to such a degree as to warrant significant punitive damages. Defendant's conduct resulted in excruciating physical harm and death. Additionally, Defendant's conduct was repetitive: it failed to act despite knowledge from a prior incident at a sister company that a vehicle coming into contact with a pressurized natural gas system, like a wellhead, could kill someone. Finally, for five years, from the time it acquired its wellheads in 1997 until the accident in 2002, it took no action to protect wellheads, despite its knowledge that excruciating physical harm and death could result by its inaction, Thus, Defendant's conduct evinced, in a non-isolated manner, indifference and a reckless disregard for the safety of the public. We conclude that in light of this conduct, "a substantial award was necessary to meet the goal of punishing [Defendant], for its conduct and deterring it, and others similarly situated in the future, from engaging in such conduct." *Chavarria,* 2006-NMSC-046, ¶37 (internal quotation marks and citation omitted).

(35) Our second inquiry requires a comparison of the "ratio [of punitive damages] to the actual harm inflicted on the plaintiff." *Aken,* 2002-NVISC-021, ¶23 (alteration in original) (quoting *BMW*, 517 U.S. at 580). Under this prong, unlike the first, we *do* consider the actual injury sustained by Decedent. *Id.* ¶23, Defendant argues that in calculating this ratio, the total compensatory damages award must be reduced by Decedent's comparative fault, because to do otherwise would result in punishing Defendant for *another party's* conduct. Here, the jury determined that Decedent suffered actual damages of $2,957,000, but that Defendant was only responsible for 65 per-

cent of that harm (and that Decedent was responsible for 35 percent). Therefore, Defendant argues, the amount of compensatory damages caused by Defendant was actually $1,922,050, and it is this amount that should be compared with the $13,000,00 in punitive damages that was awarded. This results in a ratio of punitive damages to compensatory damages of approximately 6.76 to 1 as opposed to a ratio of punitive damages to total compensatory damages of 4.4 to I. Defendant then asserts that this ratio of 6.76 to 1 is unconstitutionally excessive. Plaintiff, on the other hand, asserts that the proper ratio to consider is the ratio of punitive damages to the harm suffered, 4.4 to 1.

(36) We do not decide which ratio is applicable and assume, for purposes of analysis, that Defendant is correct in arguing that the applicable ratio we are to consider is 6,76 to 1. *See Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 576 n.6 (Or. Ct. App. 2003) (rejecting the contention that the ratio to consider is punitive damages to total damages without any deduction for the plaintiff's comparative fault). In *Campbell*, the United States Supreme Court specifically declined to impose a bright-line ratio that a punitive damages award cannot exceed. *Campbell*, 538 U.S. at 425. While stating that "[s]ingle-digit multipliers are more likely to comport with due process," *id.*, the Court also acknowledged that a single-digit multiplier does not necessarily establish an appropriate limitation on a punitive damages award in egregious cases. *Id.* In recognizing and applying these principles, our own Supreme Court has stated that the test under this prong of *BMW* is that "Wile amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or

justice." *Chavarria,* 2006-NMSC-046, ¶38 (quoting *Aken,* 2002-NMSC-021, ¶23). In this case, the jury was instructed, consistent with UJI 13-1827 NMRA, that:

> Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

(37) Defendant does not argue that the jury failed to comply with this instruction, and we must presume that the jury followed it. *Vigil,* 117 N.M. at 670, 875 P.2d at 1101. Moreover, in our examination of the record, we see no evidence that the jury disregarded the instruction.

(38) Given that Defendant's conduct was on the high end of the reprehensibility scale, that Decedent suffered excruciating pain, an intangible difficult to measure, that Decedent died, and that Decedent was only nineteen years old when he died, we conclude that neither ratio, both of which are single-digit ratios (6.76 to 1 or 4.4 to 1), exceeds constitutional limits in this case. *See generally Romo v. Ford Motor Co.,* 6 Cal. Rptr. 3d 793, 810-11 (Ct. App. 2003) (stating that in the context of malicious conduct, because public policy and the legitimate interests of a state in the protection of its people require a mechanism to punish and deter conduct that kills people, death actions present examples of cases in

which a single-digit multiplier does not form an appropriate limitation upon a punitive damage award); *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶49, 127 N.M. 1, 976 P.2d 1 (approving a multi-million-dollar punitive damages award with a ratio of 7.4 to 1).

(39) The final step in our analysis is a comparison of the punitive damages award with potential civil and criminal sanctions. "[T]he comparable sanctions factor is the least important indicium," *Aken*, 2002-NMSC-021, ¶25. This guidepost has "been criticized because the [Supreme] Court did not give any guidance as to what to do if there are *not* any substantial legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* (internal quotation marks and citation omitted). Here, Defendant failed to exercise ordinary care to protect its wellhead from contact with motor vehicles. Defendant argues that the relevant civil penalty is a $500 fine imposed for failure to fence a well site in a nearby area where such fencing is regulated. "[When statutory penalties for the conduct in question are low or do not exist, a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award." *Id.* (internal quotation marks and citation omitted). Therefore, we find this comparison unhelpful in determining the reasonableness of the punitive damages award in this case.

(40) We have carefully weighed the *BMW* factors to determine whether the punitive damages award in this case exceeds the outer limits of due process, and we conclude that it does not. We therefore affirm the jury's judgment that punitive damages of $13,000,000 are appropriate to achieve the dual goals of punishment and deterrence in this case.

CONCLUSION

(41) The final judgment is affirmed.

(42) IT IS SO ORDERED.

/s/ Michael E. Vigil
Michael E. Vigil, Judge

WE CONCUR:

/s/ James J. Wechsler
James J. Wechsler, Judge

/s/ Celia Foy Castillo
Celia Foy Castillo, Judge

Correction Page: *Val Jolley v. Energen Resources Corp.*, No, 27,489, VWCc, filed 9/22/08: Page 1, line 3: added "who was nineteen years old" after "(Decedent)"; Page 1, line 6, replaced "Plantiff's decedent" with "Decedent"; and Page 1, line 20, replaced "following" with "during"

OPINION

VIGIL, Judge.

(1) Plaintiff is the personal representative of the estate of her son (Decedent) who was nineteen years old when he died. In this wrongful death case the jury awarded Plaintiff $2,957,000 in compensatory damages, which was reduced to $1,922,05 (based on a finding that Decedent was 35 percent negligent and Defendant was 65 percent negligent. The jury also awarded Plaintiff $13,000,000 in punitive damages We affirm.

BACKGROUND

(2) On Sunday, July 21, 2002, after recreating in the Glade Run Recreation Area (Glade Run Area) on Bureau of Land Management (BLM) land just north of Farmington, Decedent backed up the vehicle he was driving to turn around and return to Farmington. He backed into an unfenced, unprotected natural gas wellhead operated by Defendant, identified as the McCord 13 well. The wellhead exploded, and Decedent burned to death at the scene after running from the vehicle with his body on fire. Plaintiff's suit for wrongful death asserted that Defendant was negligent in that Defendant failed to exercise ordinary care to protect its exposed natural gas wellhead at McCord 13 from contact with motorized vehicles. Plaintiff also contended that Defendant's conduct was so reckless as to justify an award of punitive damages. The jury heard and considered the evidence during a six-day trial in which

Correction Page: *Val Jolley v. Energen Resources Corp.*, No. 27,489, VWCc, filed 9/22/08: page replaced due to change in pagination.

twenty-eight witnesses testified, and in which numerous documents, photographs, maps, and stipulations were admitted into evidence.

(3) Defendant acquired the McCord 13 well in 1997, along with approximately one thousand other natural gas wells in the San Juan Basin. The Glade Run Area where McCord 13 is located consists of sandy arroyos, slick rock, rolling terrain, and sparse vegetation and had been used for years for outdoor recreation. In 1988, the BLM designated the 33,800 acre Glade Run Area as a Recreation Management Area; and in 1996, the BLM designated the southern part of the Glade Run Area adjacent to Farmington as open for off-road vehicle use. Before the explosion at McCord 13, 1 Defendant knew that it would be hazardous if a vehicle came into contact with a pressurized natural gas system, like a wellhead, and that it could kill someone. Notwithstanding this knowledge, Defendant did not erect any new fences or barricades around its unprotected wellheads. On the other hand, other natural gas companies operating in the Glade Run Area did erect fences and barricades around their natural gas wellheads near McCord 13 from as early as 1993 until the fall of 2001.

(4) A San Juan Deputy Sheriff testified that during his regular patrols of the Glade Run Area in the summer of 2002, he observed a fair, "almost substantial" amount of

APPENDIX B

THE SUPREME COURT OF THE
STATE OF NEW MEXICO

[November 6, 2008]

No. 31,375

VAL JOLLEY, personal representative of the Estate of JOHN EVERETT STAPLETON, deceased
Plaintiff-Respondent,

vs.

ENERGEN RESOURCES CORPORATION,
Defendant-Petitioner.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricia M. Serna, Chief Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 27489; and

IT IS FURTHER ORDERED that the motion for leave to file the amicus brief hereby is deemed moot,

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme

Court of the State of New Mexico, and the seal of said Court this 6th day of November, 2008.

(SEAL)

/s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed December 6, 2006]

No. CV-2004-00242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased
Plaintiff,

v.

ENERGEN RESOURCES CORPORATION,
Defendant.

SPECIAL VERDICT FORM

On the questions submitted, the jury finds as follows:

Question No. 1: Was Defendant Energen Resources Corporation negligent?

Answer: YES (Yes or No)

If the answer to Question No. 1 is "No", you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiffs, and you will all return to open court.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2

Question No. 2: Was any negligence of Defendant Energen Resources Corporation a cause of the Plaintiffs' injuries and damages?

Answer: YES (Yes or No)

If the answer to Question No. 2 is "No", you are not to answer further questions. Your, foreperson must sign this special verdict, which will be your verdict for the defendant and against the plaintiffs, and you will all return to open court.

If the answer to Question No. 2 is "Yes", you are to answer the remaining questions on this special verdict form. When as many as ten of you have agreed upon each of your answers, your foreperson must sign this special verdict, and you will all return to open court.

Question No. 3: In accordance with the damage instructions given by the Court, we find the total amount of compensatory damages suffered by Plaintiff as follows:

$ 2,957,000

Question No. 4: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a proximate cause of damage.

Defendant Energen Resources Corporation	65%
John Stapleton	35%
	100%

The court will multiply the percentage of the Defendant times the Plaintiffs total damages as found by the jury under Question No. 3. The court will then enter judgment for the Plaintiff and against the Defendant in the proportion of damages found as to the Defendant. If the percentage found by the jury for the Defendant is zero, then the court will enter judgment for the Defendant and against the Plaintiff.

Question No. 5: Was the conduct of Defendant Energen Resources Company reckless?

Answer: YES (Yes or No)

If the answer to Question No. 5 is "No", you are not to answer further questions. However, if your answer to Question No. 5 is "Yes", then you must answer Question No. 6.

Question No. 6: In accordance with the instructions given by the Court, we find that the following punitive damages should be awarded to Plaintiff against Defendant Energen as follows: $13,000,000.

/s/ [Illegible]
Foreperson

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed December 18, 2006]

No. CV-2004-00242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased
Plaintiff,

v.

ENERGEN RESOURCES CORPORATION,
Defendant.

JUDGMENT

THIS MATTER having come before the Court for trial by jury on November 27, 28 and 29 and December 4, 5 and 6, 2006, the Plaintiff appearing in person and by his attorneys, Guebert, Bruckner & Bootes, P.C., and the Defendant appearing through its designated representative and by its attorneys, Holland & Hart LLP, and the jury, having heard the evidence, testimony and argument presented and having entered a verdict in favor of the Plaintiff and against the Defendant, Judgment is hereby entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Plaintiff recover the following: compensatory damages in the amount of one million, nine hundred twenty-two thousand, fifty dollars ($1,922,050.00), and punitive damages in the amount of thirteen million dollars ($13,000,000.00), for a

Total Judgment in the amount of fourteen million, nine hundred twenty-two thousand, fifty dollars ($14,922,050.00), with costs and interest to be assessed as allowed by law.

James A Hall
The Honorable James A. Hall
District Court Judge, Div. II

SUBMITTED BY

GUEBERT BRUCKNER & BOOTES, P.C.

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APPROVED AS TO FORM BY:

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By: Telephonic Approval as to Form, Dec. 13, 2006
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Attorneys for Defendant Energen

APPENDIX E

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed February 8, 2007]

No. CV-2004-00242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased
Plaintiff,

v.

ENERGEN RESOURCES CORPORATION,
Defendant.

ORDER DENYING ENERGEN'S MOTION FOR NEW TRIAL OR, ALTERNATIVELY, REMITTITUR

THIS MATTER having come before the Court for hearing on February 1, 2007, upon a Motion for New Trial or, Alternatively, Remittitur, filed by Defendant Energen, Plaintiff appearing at the hearing by telephone and by his attorneys, Guebert, Bruckner & Bootes, P.C., and Defendant appearing at the hearing through its attorneys, Holland & Hart LLP, and the Court having read the pleadings, having heard the argument of counsel and being fully advised in the premises, FINDS that the Motion is not well taken and should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Energen's Motion for New Trial or, Alternatively, Remittitur, is hereby denied, *nunc pro tunc* to February 1, 2007.

James A Hall
The Honorable James A. Hall
District Court Judge, Div. II

SUBMITTED BY

GUEBERT BRUCKNER & BOOTES, P.C.

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APPENDIX F

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed January 3, 2007]

No. D-0101-CV-2004-0242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, deceased
Plaintiff,

v.

ENERGEN RESOURCES CORPORATION,
Defendant.

ENERGEN'S MOTION FOR NEW TRIAL OR, ALTERNATIVELY, FOR REMITTITUR

Energen Resources Corporation ("Energen"), by and through counsel, requests that the Court order a new trial or reduce the jury's verdict on grounds that it is grossly excessive, resulted from passion or prejudice, is not supported by the evidence, and resulted from plaintiffs counsel's improper remarks in closing argument, including flagrant, opportunistic, and incurable breaches of the Court's order *in limine* regarding subsequent remedial measures. In support, Energen states as follows:

I. ISSUES PRESENTED

A. *Regarding Closing Argument:*

- When asking for punitive damages, plaintiffs counsel made statements about subsequent remedial measures, which not only violated

this Court's order *in limine,* and argued facts not in evidence, but were also false and known to be false. The jury subsequently returned a verdict which included $13,000,000 in punitive damages. Should the resulting verdict be allowed to stand?

- To compound the problem, in the same sentence, plaintiffs counsel told the jury that Energen would take no remedial action unless the jury would "send a message" to Energen, by awarding punitive damages. In fact, Energen took remedial action in 2002, within days after the accident. Plaintiff's counsel was aware of this fact when he implored the jury to "send a message." Should the resulting verdict be allowed to stand?
- Following these remarks, in connection with objections to them and a motion for a mistrial, Energen asked the Court to correct the factual misrepresentations made by plaintiff's counsel, by advising the jury of the subsequent remedial measures that had been taken after the accident. The Court refused to give the jury this information. Should the resulting verdict be allowed to stand?
- During the same argument, plaintiff's counsel made a "Golden Rule" argument, in which he asked the jury to consider and award the amount of compensation they would want if they had suffered as Mr. Stapleton had. Even after Energen's objections to these arguments were sustained, plaintiff's counsel continued to make them, and simply cloaked them in the guise of "the reasonable man." Like every other state in the country, New Mexico prohibits

these arguments. Can the resulting verdict be allowed to stand?

- Throughout closing argument, plaintiff's counsel improperly offered his personal opinions and conclusions to jury, including inappropriate comments on the veracity of Energen's witnesses. Like every state in the country, New Mexico prohibits counsel from "vouching" on his client's behalf. Can the resulting verdict be allowed to stand?

B. Regarding the verdict, itself:

- The jury awarded $1,922,050 in compensatory damages (calculated as sixty-five percent of plaintiff's actual damages of $2,957,000, based on a conclusion that plaintiff's decedent was 35% at fault) and $13,000,000 in punitive damages. Are these amounts supported by the evidence, or the constitution, or the law?

II. ARGUMENT

A. *Improper Closing Argument*

Argument that is improper, by exceeding the record or attempting to inflame the jurors, may warrant reversal of judgment and a new trial. *See Griego v. Conwell,* 54 N.M. 287, 292, 222 P.2d 606. 609 (1950). New trial is due when such argument was "reasonably calculated to cause and probably did cause the rendition of any improper judgment in the case." *Apodaca v. United States Fidelity and Guar. Co.,* 78 N.M. 501, 50, 433, P.2d 86, 87 (1967). The same is true when it deprives the opponent of a fair trial. *See Romero v. Melbourne,* 90 N.M. 169, 173, 561 P.2d 31, 35 (Ct. App. 1977). Here, Plaintiff's counsel made several such arguments.

1. *Violation of the Court's Order in Limine*

During closing argument, Mr. Guebert commented on Energen's subsequent remedial measures. Arguing for punitive damages, he represented that Energen had "still" not "done the right thing" or taken measures to prevent auto collisions with Glade Area wells; he then told the jury that Energen would not do so unless and until the jury "sent a message" forcing it to do so. These statements clearly and directly violated this Court's pretrial order *in limine*.

The Court had granted Energen's pretrial motion to exclude evidence of subsequent remedial measures, including evidence that Energen fenced or barricaded wells after plaintiff's decedent's accident. On this subject, as well as others that it excluded, the Court clarified:

> Your only obligation at this point is to not raise it in front of the jury. However, if you feel circumstances are such that it's admissible evidence, raise it outside the presence of the jury.

Ex. A (relevant excerpts of Transcript of Proceedings on November 7, 2006) at TR-6.

The Court's ruling and admonition were fundamental *"in limine"* process, to prevent prejudicial statements to the jury on matters with no proper bearing on issues in the case. *See Proper v Mowry*, 90 N.M. 710, 714, 568 P.2d 236, 240 (Ct. App. 1977). As adopted, this process replaced prior practices, by which attorneys opposing prejudicial evidence strictly did so in trial, and thus had to "choose between (1) permitting prejudice to be planted by opposing counsel or (2) stimulating this implantation by his own objections." *Id.* at 715, 568 P.2d at 241. A "shrewd lawyer under that process could benefit both

from insinuating prejudicial facts in his questions and the jury's inference that (successful) objecting counsel has something to hide. *Id.* The *in limine* process was also adopted because the typical Court's admonition, directing the jury to disregard matters raised in such exchanges, was "ineffective, unrealistic and psychologically invalid." *Id.* (citing Jerome N. Frank, Courts on Trial, p. 111 (1949)).[1]

Appearing to comply with the pretrial ruling, plaintiff presented no evidence on subsequent remedial measures, and never asked the Court to revisit its prior ruling. When a Juror, by written question, asked whether Energen had fenced its wells since the accident, plaintiff agreed with the Court's decision not to respond. While cross-examining Buddy Shaw (a defense standard-of-care expert, whose testimony concluded moments before closing argument), Mr. Guebert even initiated a sidebar to ensure that Shaw knew of the Court's order and would not violate it in his responses. Thus, throughout the evidentiary phase, plaintiff displayed an intent to abide by the Court's pretrial ruling, and gave neither Energen nor the court any reason to suspect that Energen's subsequent remedial measures would be raised or discussed.

Instead of lawfully, ethically challenging this Court's ruling, Mr. Guebert simply waited for closing argument to violate it. *See* NMRA 16-304(C) (ethical prohibition on knowing disobedience of any obligation

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[1] Even recently, courts still hold this view. The limine process is based on recognition that when prejudicial matters are brought before the jury, no amount of objection or instruction can entirely remove the harmful effect. *Kjerstad v. Ravellette Publ'n, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994). "Once the question is asked, the harm is done." *Id.*

under the rules of a tribunal except [by] open refusal based on an assertion that no valid obligation exists."); *see also Proper*, 90 N.M. at 715, 568 P.2d at 241 ("[T]he presentation of excluded matter to the jury by suggestion, by the wording of a question, or by indirection, violated professional standards and counsel's duty to the court.") And instead of offering any evidence on the topic, Mr. Guebert, offered, in essence, his own testimony. *See* NMRA 16-304(E) ("A lawyer shall not ... in trial ... assert personal knowledge of facts in issue except when testifying as a witness"). Worse, he misstated that Energen had *never* fenced its wells. *See id*, (B) ("A lawyer shall not falsify evidence").[2] *Cf. State v. Cummings*, 57 N.M. 36, 39-40, 253 P,2d 321, 323-324 (1953) ("[A] statement of facts entirely outside of the evidence, and highly prejudicial to the accused, cannot be justified as argument ... [The prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.") (reversing judgment).

Such a direct violation of an order *in limine* justifies a new trial regardless of when it occurs during a trial. But, its timing here seals such a fate. *State v. Callaway*, 109 N.M. 564, 567, 787 P.2d 1247, 1250 (Ct. App. 1989) affirmed a trial court's declaration of mistrial, based on defense counsel's violation of an

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[2] Mr. Guebert knew these statements were false. Besides discussions in the pretrial ruling and during evidence (including his sidebar acknowledgement during cross-examination of Mr. Shaw, just hours before closing argument), he was privy to depositions in the case, including Gary Brink (Ex. B), J.T. Hayes (Ex. C), William Lyons (Ex. D) and Ernest Cardona (Ex. E), which confirm the McCord 13 and other Energen wells were fenced after the July 2002 accident.

order *in limine*. As basis for concluding the violation had "seriously prejudiced the state's case," the Court of Appeals noted that the state had presented little evidence on the topic for which the Court had prohibited reference (the victim's credibility) and the defense had, improperly, attacked. Likewise, during evidence, Energen in valid reliance on the Court's pretrial ruling, had put on *no* witnesses to discuss subsequent remedial measures.

Other jurisdictions agree that such factors should be considered in determining whether a violation of an order *in limine* has prejudiced a party. *See Loen v. Anderson*, 692 N.W.2d 194, 199 (S.D. 2005) (whether the prejudicial information was intentionally solicited, of inflammatory nature, likely to confuse the jury and to have an improper effect on the verdict; whether the violation repeatedly occurred and was curable through instruction); *accord Honaker v. Mahon*, 552 S.E.2d 788, 795 (W.Va. 2001). Here, each factor demonstrates that Energen suffered unfair prejudice as a result of Mr. Guebert's violation. Further, that Mr. Guebert violated an order *in limine* by *misstating* facts, not only exacerbates the violation, but amounts to a denial of fair trial, in itself. *See Kutchins v. Berg*, 638 N.E.2d 673, 676 (Ill. App. 1994) (reversing judgment).

Admission of subsequent remedial measures, in violation of a court order, warrants a new trial. *See Jordan v. Sch. Bd. of Broward County*, 531 So.2d 976, 977 (Fla. App. 1988) (affirming award of new trial). Failure to so order is reversible error. *See, e.g., Walt Disney World Co. v. Blalock*, 640 So.2d 1156, (Fla. App. 1994) (also dismissing a curative instruction as ineffective, likening it to instructing jurors not to smell a skunk after it was thrown into the jury box).

When a closing argument violates an order *in limine,* the prejudice that results can be found in the record setting forth the reasons why the order was entered in the first place. *See, e.g., Liberatore v. Thompson,* 760 P.2d 612, 618 (Ariz. App. 1988). Mr. Guebert's tactic was obviously aimed to prejudice the rights of Energen, and finding its mark, it caused Energen to receive an unfair trial. *See Romero,* 90 N.M. at 173, 561 P.2d at 35 (indicating general standard for order of new trial based on improper closing argument); *Apodaca,* 78 N.M. at 502, 433 P.2d at 87 (same). Mr. Guebert made the remark specifically for and about punitive damages.[3] The jury returned a verdict of $13 million in punitive damages. This approximates the basic measure of punitive damages (one-half a percent of Energen's net worth) that Mr. Guebert, in the same context, asked the jury to apply. Further, the jury made this decision in a case where no witness avowed knowledge of any such collision before causing personal injury or death; all Energen, Bureau of Land Management and San Juan County Sheriff's Department representatives who testified on the subject disavowed any knowledge of such incidents ever having occurred; and representatives of the Bureau of Land Management confirmed that, in the Glade Run Area, alone, and in just the past 40 years, there would have been at least 10 million instances of cars passing by natural gas wellheads without a single such incident occurring.

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[3] It is telling that Mr. Guebert, when responding to Energen's motion for a mistrial, did not deny, explain or justify his statements, but simply suggested a limiting instruction would suffice.

2. *"Send a Message" Argument*

Asking the jury to "send a message" with its verdict is also improper. *See State v. Cooper,* 2000 NMCA 41, P14-16. It suggested the jury should decide on some basis other than evidence, and might thereby reshape relationships among persons and entities other than the litigants. For example. it suggested that the jury might trigger some broader response from the oil and gas industry by punishing Energen with a verdict of newsworthy proportions.

3. *Court's Limited Admonition and Refusal to Disabuse False Impression*

Following these remarks, in connection with objections to them and a motion for a mistrial, Energen asked the court to correct the factual misrepresentation made by plaintiff's counsel, by advising the jury of the subsequent remedial measures that had, in fact, been taken shortly after the accident. The court refused to give the jury this information.

In part, the Court based its refusal on grounds that to do so would be adding facts after the close of evidence. This shows why Mr. Guebert's misconduct was incurable. Because he waited until after the close of evidence to convey new, false facts, the Court could not correct the jury's misimpression, and could only admonish the jury that his statements were not evidence. If the Court of Appeals in *Proper* generally found such admonitions "ineffective, unrealistic and psychologically invalid," how much more is this true when counsel's characterization of facts (on which the Jury received no other "evidence") is entirely false, is never, in any way, corrected before the jury deliberates and, finally, occurred in clear violation of

the Court's pretrial order? *Cf Chavez v Valdez*, 64 N.M. 143, 147, 325 P.2d 919, 921 (1958) ("We think the statements of the trial court were entirely too mild to eradicate the objectionable opening statement made, which . . . was in clear violation of and in defiance of the ruling of the court."); *see also, id* at 148, 325 P.2d at 922 (reversing judgment in reliance on authority for mistrial based on improper closing arguments to the jury, and applying same standards to improper opening statement).

Further, the Court's inability to correct the false impression that Mr. Guebert cultivated distinguishes this case from authority that a jury admonition, alone, can cure prejudice. In *Beal v. Southern Union Gas Co.*, 66 N.M. 424, 435, 349 P.2d 337, 345 (1960), the suggestion of improper matters occurred during the evidence. Thus, the court could sufficiently admonish the jury by not only instructing them to disregard the matter, but also specifically dispelling the mistaken conclusion that they were likely to draw:

> Under no circumstances will you consider those three pieces of pipe. The Court has legally rejected them as evidence in the case. *However, for your enlightenment, they were taken from private property, from a tourist court on the north side of Central, at 4723 Central, Northwest. They were removed about a year and a half after the explosion. I am saying this just to thoroughly have you reject them from any possible consideration, whatever.* They are not in the case, and they are not to be considered by you under any circumstances."

Id. (emphasis added). Here, the Court could not, in any similar fashion, re-level the playing field that

Mr. Guebert had deliberately tipped. *Cf. State v. Brown*, 1997-NMSC-29, P8 (example of curative instruction following improper opening on the issue of possible penalties; court identifies specific issue improperly introduced and instructs jury to disregard).

The Court also refused to instruct the jury on the true state of Energen's subsequent remedial measures on grounds that such would add prejudice to Energen. The Court correctly noted that the purpose of NMRA 11-407 (from which its order *in limine* arose) is to protect defendants from an inference that persons who take certain precautions after an accident are, *per se*, negligent for having failed to take them before the accident. Thus, providing the requested new evidence to "cure" the unfairly prejudicial effect that Mr. Guebert's remarks promised to have on damages might, instead, unfairly prejudice the jury's threshold determination of negligence, as well as its comparison of the parties' fault. While these concerns by the Court were logical, they also show the prejudice from Mr. Guebert's comments was utterly incurable.

Regardless, Energen would have been better protected had the Court given its requested, warranted instruction—that Energen had, in fact, fenced its wells. The punitive award ($13 million) outweighed the negligence/comparative-fault component ($1.9 million) by more than 6- to-1. While seeking to prevent a presumption of negligence, the Court failed to correct Mr. Guebert's false portrayal of continuing, callous disregard. Perhaps this effort helped Energen avoid 35% of the fault (the percentage of fault assigned to Stapleton) and, thus, liability for $1,034.950.00 of the jury's $2,957,000 total in com-

pensatory damages. But, by any reasonable interpretation of the outcome, it also fueled the jury's much greater award of punitive damages.

4. *Counsel's Scornful Comment on Court's Admonition, and Renewed Violation of Order in Rebuttal Argument.*

Even after violating the Court's order during his initial closing argument, and drawing the Court's limited admonition to the jury, Mr. Guebert did not relent, but returned to the topic in rebuttal. He, again suggested Energen had still not "done what's right." Then, in dismissive remarks about aspects of Energen's defense, he noted, "there are things I don't get to tell you, but then Mr. Berge argues _____...." Thus, he not only repeated the prior violation, but suggested what he had previously argued about the status of fencing was, in fact, correct. He also cultivated an impression that Energen was trying to conceal the fact (which, again, was not a fact, at all) that its wells remained unfenced, and that the Court with its prior admonition was cooperating in this concealment. Among other improprieties, this tactic undermined any curative effect of the Court's prior admonition. Such factors—that counsel's improper argument is unremitting, even after direct admonition from the Court; that counsel denigrates defendant's lawful exercise of evidentiary protections, shows sarcasm in response to sustained objections and expresses to the jury his disdain for the Court and opposing counsel; and that counsel attempts to inflame the jury with matters which could not be brought before them as evidence—are not only grounds for a mistrial, but further amount to a "willful disregard" of the risks of mistrial by the

offending counsel. *See State v. Breit,* 1996 NMSC 67, **39-48, 57-65, 69-72.

5. *Golden Rule Argument*

During the same argument, plaintiff's counsel also made a prohibited "Golden Rule" argument, in which he asked the jury to consider and award the amount of compensation they would want if they had suffered as Mr. Stapleton had. *See Jackson v. Southwestern Pub. Serv. Co.,* 66 N.M. 458, 349 P.2d 1029 (1960) ("[I]t is improper to ask the jury to place themselves in the position of the plaintiff and to consider how much they would take to have one of their legs cut off.") (granting remittitur; citations omitted). And after Energen's objections were sustained, plaintiff's counsel continued to make them, cloaking them in the guise of "the reasonable man."

6. *Improper "Vouching"*

Throughout closing argument, plaintiff's counsel improperly offered his personal opinions and conclusions to jury, including inappropriate comments on the veracity of Energen's witnesses of defense counsel, the justness of the lawsuit, what would be an appropriate amount of punitive damages and (without any connection to testimony) the wishes of Mr. and Mrs. Stapleton, who were neither his clients nor beneficiaries of the Estate which is his client. (He assured the jury they would rather have their grandson than any amount of money.) Besides such appeals to the sympathy of jurors, New Mexico prohibits counsel from injecting his own credibility into a case by vouching for the credibility of witnesses, the justness of a cause or other facts. *See McDowell v. Napolitano,* 119 N.M. 696, 701, 895 P.2d 218, 223 (1995) (citing NM RA 16-304(E): *State v.*

Pennington, 115 N.M. 372, 381, 851 P.2d 494, 503 (Ct. App.), *cert. denied, 115* N.M. 409, 852 P.2d 682 (1993)).

B. Excessiveness of Verdict

That the jury award of $13,000,000 in punitive damages exceeds Constitutional limitations, and cannot be upheld, also shows Energen was unfairly prejudiced by Mr. Guebert's inflammatory, improper arguments . In gauging reasonableness of a punitive damages award, the Court is guided by three criteria, derived from *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574-75. 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) and adapted to New Mexico law in *Aken v. Plains Elec. Generation & Transmission Coop., Inc.,* 2002 NMSC 21, PP20-21, 23, 25. Those three criteria are as follows: (1) the reprehensibility of the defendant's conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and the punitive damages award: and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases. *Id.,* 2002 NMSC 21, P20.

The degree of reprehensibility of a defendant's conduct is "'[t]he most important indicium of the reasonableness of a punitive damages award." *State Farm Mut. Auto. Ins. Co. v Campbell.* 538 U.S. 408, 419 (2003) *(quoting BMW,* 517 U.S. at 575). On grounds discussed herein and in Energen's prior motion for summary judgment, the Court here should conclude, as did the Supreme Court in *BMW,* that Defendant's "conduct evinced no indifference to or reckless disregard for the health and safety of others" and that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The undisputed evidence at trial

was that no witness had ever heard of this type collision happening before on any Energen wellsite or anywhere else in New Mexico. While Plaintiff, arguably, represented the 1 in 10 million prospect of this occurring, the evidence also demonstrated that it only occurred in his case with the added factors of his having consumed alcohol, been on a suspended driver's license, entered the Glade in trespass (in violation of B.L.M. requirements of licensure and compliance with State motor vehicle statutes) and operating in reverse, at a high rate of speed.

Plaintiff, over objection, put in evidence of one prior fatality involving an Energen affiliate. But that 1983 incident involved out-of-state conduct (in Moody, Alabama), lacking any nexus to the specific harm suffered by Plaintiff. *See Campbell,* 538 U.S. at 420-423. That injury did not involve an automobile collision with a rural natural gas wellheads (which, the evidence showed weighs 1,300 pounds, and stands over six feet high), but a neighborhood collision with a two- or three-foot high residential service meter, built of small, 2/3-inch pipe. It was error for that evidence to have been admitted. Regardless, in no way is that prior, remote incident basis for the Court to punish Energen for not foreseeing that this collision could occur at its remote, McCord 13 Well location, or as grounds to uphold the jury's excessive punitive award. *See id.*

The ratio between the jury's punitive and compensatory damage awards is 6.7-to-1. That figure exceeds the 4-to-1 ratio that the Supreme Court has repeatedly indicated may be the "line of constitutional impropriety." *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23-24 (1991); *Gore*, 517 U.S. at 581; *Campbell*, 538 U.S. at 425. Further, Plaintiff's

compensatory damages in this matter were substantial, totaling $1,922,050.00. In *Campbell,* the Supreme Court indicated, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Finally, the civil fines applicable to violations of municipal ordinances for failure to fence wells within their city limits is nominal. In Farmington, New Mexico, the amount is only $500.00 per occurrence. *See* Ex. F. Likewise in Aztec, New Mexico. *See* Ex. G.

For all of the above reasons, the Court must also assume Mr. Guebert's misconduct influenced the jury's assessments both of Energen's negligence and allocation of the parties' fault. This is further suggested by the fact that the jury assessed only 35% of the fault to a 19-year-old young man who, while drinking and driving on a suspended license, backed his automobile into a six-foot high, four-foot wide, red-topped wellhead, while—his own friends admit—he was "hauling ass backwards" and not watching where he was going. This occurred even though he had just before, driven by the wellhead three times, parked on the wellsite and walked around it. And it occurred even though he, like all of his companions, had known and been told all of their lives to stay away from the wellsite equipment throughout the Glade.

WHEREFORE, for all of the reasons stated, Energen Resources Corporation respectfully requests that this Court order a new trial; alternatively, reduce the judgment with respect to punitive and compensatory damages; and award Energen any other and further relief deemed just and appropriate under the premises.

Respectfully,

HOLLAND & HART LLP

By: /s/ [Illegible]
Bradford C. Berge
Trent A. Howell
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Post Office Box 2208
Santa Fe, NM 87504-8405
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Attorneys for Energen Resources Corp.

EXHIBIT A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed November 7, 2006]

No. D-0101-CV-200400242

STEVEN FARBER, Personal Representative of the Estate of CODY AMEZCUA, Deceased, et al.,
Plaintiffs,

v.

ENERGEN RESOURCES CORPORATION, ET AL.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 7th day of November, 2006, at approximately 2:00 p.m., this matter came for hearing on ALL PRE-TRIAL MOTIONS, before the HONORABLE JAMES A. HALL, Judge of the First Judicial District, State of New Mexico, Division II.

The Plaintiff, VAL JOLLEY, appeared by Counsels of Record, TERRY R. GUEBERT, DON BRUCKNER, Guebert, Bruckner & Bootes, P.C., Attorneys at Law, Post Office Box 93880, Albuquerque, New Mexico 07199-3880.

The Plaintiff, HEATHER HOGUE, appeared by Counsel of Record, JOE M. ROMERO, JR., Romero & Associates, P.A., Attorneys at Law, 1905 Lomas NW, Albuquerque, New Mexico 87104-1207.

[TR-5] So on the Motion to Amend—I don't think the Motion to Clarify or to Amend included a proposed complaint which would be the norm in a Motion to Amend, but I'm allowing amendment only as it relates to asserting a claim for loss of consortium.

I'll give you seven calendar days from today's date to file your amended complaint setting forth that claim.

Questions?

(Note: Excerpt.)

THE COURT: Okay. Next, I want to turn to the motions in limine. A lot of issues, but pretty straightforward issues on these, and I've read through all of them. Frankly, I'm ready to rule on pretty much all of them based on the pleadings. I think you've covered it fairly well. My thought is perhaps give each side 15 minutes or so to identify whatever you think is of significant import or what you want to emphasize, and then I'll just rule on them all. And this is the motions in limine from both sides.

So, Mr. Bruckner?

(Note: Excerpt of Court's Observations, Directions, Ruling.)

THE COURT: I'll go through the motions in limine. And let me first state that if I grant a motion in limine, it simply means that the issue may not be raised in front of the Jury. I've learned a long time ago that trials are fluid [TR-6] events, and sometimes things that I rule to be inadmissible at this point may become admissible depending on how the case proceeds. Your only obligation at this point is to not

raise it in front of the Jury. However, if you feel circumstances are such hat it's admissible evidence, raise it outside the presence of the Jury.

I'll start with the Claimants' Joint Motion in Limine. I'm just going to go through them as they're briefed. Evidence of shooting of firearms by persons other than the Claimants, that Motion in Limine is denied. Evidence of drinking alcohol, that motion is denied. Evidence that Tommy Webb made an adjustment to oil field equipment in the Glade area before the accident, that motion is denied. Evidence of tire marks near Unit 13, that motion is denied.

As to the Uniform Accident Report itself, the motion is granted, as far as the admission of the report. As to statements of Webb and Ross, I deny the Motion in Limine, but I do note that I have to make a determination as to whether the foundation for an excited utterance is adequate. So that objection, obviously, can be renewed once we're in trial and I hear that foundation.

Evidence relating to driver's license and driving record, I deny the Motion in Limine as to evidence that John Stapleton's driver's license was suspended; I grant the Motion in Limine as to the entirety of the record. While I suppose there's some argument in his license status affects his status on the [TR-7] property and, therefore, I think it's appropriate to allow evidence of the suspension, I would exclude the driving record itself. I don't see that it goes to the negligent entrustment claim. To the extent it might have some relevance on that claim, I would exclude it under 403.

Evidence of the knife, I grant the motion at this point. Especially, since the claim as to Ms. Hogue is

not going to be tried in this lawsuit, and the knife apparently is connected to her in some fashion, I am concerned about admitting evidence related to that. So, at this point, I would exclude it under 403. Again, you can renew this if you think it can be more closely tied ro the case we're going to try next week.

And, finally, evidence of a fight the night before the incident, I grant this Motion in Limine. I fail to see its relevance. To the extent it is relevant, I would exclude it under 403.

Next, we have the Defendant's Second Motion in Limine, Exclusion of Post-accident Preventive Measures. I grant this in Limine. If at any point during the course of the trial, Defendant presents evidence or argument that preventive measures were not feasible, at that point this type of evidence could come in. But I don't see the Defendant as raising that argument here. So, at this point, I grant that Motion in Limine.

Defendant's Third Motion in Limine, irrelevant and unfairly prejudicial evidence: The photographs of Mr. Stapleton's

* * * *

EXHIBIT B

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed February 8, 2005]

No. CV-2004-00242

STEVEN FARBER, Personal Representative of the Estate of CODY AMEZCUA, Deceased, CAMERON FORTNEY and HEATHER HOGUE,
Plaintiffs,

vs.

ENERGEN RESOURCES CORPORATION, and VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Defendants,

and

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Cross-Claimant,

vs

ENERGEN RESOURCES CORPORATION,
Cross-Defendants.

VIDEOTAPED DEPOSITION OF
GARY WAYNE BRINK

February 8, 2005
9:00 a.m.

3041 East Main Street
Farmington, New Mexico

* * * *

[51] magazines that I'm not even aware of.

Q. Okay. After the incident at the McCord well where these two young men were killed, have there been some new fences erected in the Glade Run Trail area?

A. Yes, there has been.

Q. Any idea how many?

A. I don't recall how many. I think there has been three or four, five.

Q. Were these fences erected by a contractor?

A. Yes, they were erected by contractors.

Q. Who was that?

A. I think the fencing company that erected the fences in this particular area was TNT Fence Company.

Q. Did they fence all of the properties that are operated by Energen in the Glade Run Trail area?

A. No, they did not.

Q. Did you participate in the decisions as to which properties were fenced after this accident and which ones as opposed—and which ones would not be?

* * * *

[65] quarterly we—the operators even meet with the New Mexico Oil and Gas Association and discuss different issues.

Q. At any of these meetings either prior to or after July of 2002 when these boys were killed, was there any discussions about the—from any of the other producers about fencing and when they fence and when they didn't fence, things of that nature?

A. Not that I'm aware of. I'm sure that there has possibly been discussions about fencing and not fencing well locations.

Q. Have you learned that some companies are more aggressive about their fencing practices than others?

A. I am not aware that there's any company more aggressive or less aggressive about fencing locations.

Q. Okay. Let me show you McCord #13, which is on the map as red dot 21. And the map I'm referring to is Exhibit 14.

A. Exhibit 14

Q. 14. Okay. And that's also Section 22, correct?

A. That is correct.

* * * *

[66] Q. And that's a new fence, isn't it?

A. That is a new fence.

Q. So after July of 2002, Energen fenced all of the well sites—strike that. In July of 2002, to summarize this section, 20 was fenced, which would have been the McCord #13E. But 18, which is McCord #4E, was not fenced, but it had pipe barriers, correct?

A. Based on your picture, that is correct.

Q. Yes, sir. 19 was fenced afterwards and 21 was fenced afterwards. 21 is our well site involved in this accident, correct?

A. That is correct.

MR. BERGE: Hey, Bill, 21 is not among the photos that you sent to me. I didn't get that one. It skips from 20 to 22 and the Bates numbers go from 13 to 14.

MR. CARPENTER: It's not here either.

MR. BERGE: Got to watch him.

MR. CARPENTER: You want me to make a copy of it?

* * * *

EXHIBIT C

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

[Filed December 7, 2005]

No. CV 2004-0242

STEVEN FARBER, Personal Representative of the Estate of CODY AMEZCUA, deceased, CAMERON FORTNEY and HEATHER HOGUE,
Plaintiffs,

vs.

ENERGEN RESOURCES CORPORATION, and VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, deceased,
Defendants,

and

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, deceased,
Cross-Claimant,

vs

ENERGEN RESOURCES CORPORATION,
Cross-Defendants.

VIDEOTAPED DEPOSITION OF
J.T. HAYES

December 7, 2005
2:11 p.m.

6723 Academy Road, Northeast
Albuquerque, New Mexico

PURSUANT TO THE NEW MEXICO RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: MR. BRADFORD C. BERGE,
Attorney for Defendant Energen

* * * *

[30] Q. Oh, I'm talking about actually being on the well location during this interval that we defined as sometime, or some space of time, 5 to 30 minutes, according to your understanding, right?

A. Yes, sir.

Q. Did you see any testimony about them driving that car around on the well location, by the well, before they actually drove into it?

A. The only testimony that I recall was—and I think it was Tommy who said that he doesn't know how he turned around, but that Cody drove in, backed up, turned around and made a U-turn. That's the only testimony I recall about driving on the pad area.

Q. Okay. Now, when you went out, yourself, to visit the McCord 13, obviously that has a fence around it now, right?

A. Yes, sir.

Q. And you said you saw two other wells, one was to the south?

A. Yes, I'm certain that probably I drove by it more than two. I know that the one that I originally thought I was going to the right well site, because of the directions was to the south of that. And I think I probably drove by a couple of others. On my way out I took a completely different

* * * *

EXHIBIT D

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

[Filed August 17, 2006]

No. CV 2004-00242

STEVEN FARBER, Personal Representative of the Estate of CODY AMEZCUA, Deceased, CAMERON FORTNEY and HEATHER HOGUE,
Plaintiffs,

vs.

ENERGEN RESOURCES CORPORATION, and VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Defendants,

and

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Cross-Claimant,

vs.

ENERGEN RESOURCES CORPORATION,
Cross-Defendants.

DEPOSITION OF WILLIAM LYONS

August 17, 2006
1:30 p.m.

6723 Academy Road, Ne
Albuquerque, New Mexico

PURSUANT TO THE NEW MEXICO RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: WILLIAM H. CARPENTER, ESQ.
Attorney For Plaintiff Farber

* * * *

[53] Q. How many pathways from the top?

A. I don't know. I couldn't tell you; I would have to go back and look.

Q. More than a few?

A. I think more than a few.

Q. And how about from the west, which goes downhill?

A. The west is kind of blocked by I think a little bit of a ditch in there.

Q. And the east?

A. There's a little bit of a parapet.

Q. And they have also got the well processing equipment and things like that?

A. Right, but there is probably 100 feet across that whole thing.

Q. Could you tell where cars had come onto the well site and exited from the north or vice versa?'

MR. HOWELL: Are you asking him when he went out and saw it?

MR. CARPENTER: When he went out and saw it, yes.

A. No, I couldn't tell that, whether there were recent cars in that. Of course when I was out there, the fence was already up.

Q. (By Mr. Carpenter) Okay. Let's see what

* * * *

EXHIBIT E

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

[Filed February 8, 2005]

No. CV-2004-00242

STEVEN FARBER, Personal Representative of the Estate of CODY AMEZCUA, Deceased, CAMERON FORTNEY and HEATHER HOGUE,
Plaintiffs,

vs.

ENERGEN RESOURCES CORPORATION, and VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Defendants,

and

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Cross-Claimant,

vs.

ENERGEN RESOURCES CORPORATION,
Cross-Defendants.

VIDEOTAPED DEPOSITION OF
ERNEST CARDONA

February 8, 2005
2:00 p.m.

Farmington Museum & Visitors Center
3041 East Main Street
Farmington, New Mexico

* * * *

[44] A. As long as I remember, yes.

Q. All right. And then on 19, which is in 22—

A. 24.

Q. That's a new fence.

A. Yes, sir.

Q. After the accident. You remember it being put in.

A. Yes, sir.

Q. And had it been identified prior to the accident as one in need of fencing? 19?

A. To my recollection, you know, that wasn't identified as one that, you know, something that might have been—a location that would have been hazardous. It was done because of the fact that, you know, just as a precautionary.

Q. Sure. And this probably, up here on 19, is fairly remote to most of the activities associated with the Glade recreations part, correct?

A. Well, then again, you know, as your aerial photo shows, if you look at it, there's roads that criss-cross it also.

* * * *

EXHIBIT F

Chapter 1. GENERAL PROVISIONS

Sec. 1-1-10. General penalty; additional fees; additional penalties for certain acts.

(a) General penalty. Whenever in this Code or in any other ordinance or resolution of the city or in any regulation of order promulgated by an officer or agency of the city under authority duly vested in him act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor where no resolution of the city or such rule, regulation or order shall be punished by a fine not exceeding $500.00 or imprisonment for a term not exceeding 90 days or by both such fine and imprisonment. Except where otherwise provided every day any violation of this Code or any other ordinance or resolution of the city, of such rule regulation or order shall constitute a separate offense

* * * *

ARTICLE 3. EQUIPMENT, OPERATIONS, STANDARDS AND PRACTICES

Sec. 19-3-10. Fencing and landscaping of well site.

(a) Under this chapter, all drilling and production sites shall be enclosed on all sides by a minimum six-foot chainlink fence with double strands of barbed wire across the top. Well sites within 300 feet of a principal use building shall be at a minimum, opaque prewoven slats in chainlink or other type, as approved by the director. The chainlink fence shall have a minimum of two remotely located gates or exitways, on the site and the gates shall be kept locked at all times when the permittee or his employees are not within the enclosure.

(b) If at any time a principal use building comes within 300 feet of the well site, the permittee shall submit a landscaping and screening plan within 60 days for review and approval by the director. The site shall be screened and landscaped in substantial conformance with the development services division landscape policy for purposes of screening the production facilities from outside view and ensuring the compatibility of the well site with the surrounding area.

(c) Well sites annexed into the city shall have 60 days to submit a screening and landscaping plan for review and approval by the director if they are within 100 feet of a street or 300 feet of a principal use building.

(d) Waivers to the development services landscape policy may be approved by the director.

(Code 1969, § 22-30: Ord. No. 98-1068, § 25, 2-24-1998; Ord. No. 06-1168, § 29, 2-28-2006)

EXHIBIT G

CITY OF AZTEC CITY CODES
GENERAL PROVISIONS

Sec. 1-8. General penalty for violations; injunctive relief authorized.

(a) In this section "violation of this Code" means:

(1) Doing an act that is prohibited or made or declared unlawful, an offense or a misdemeanor by ordinance or by rule or regulation authorized by ordinance;

* * * *

(c) Except as otherwise provided, a person convicted of a violation of this Code shall be punished by a fine not exceeding five hundred dollars ($500.00), imprisonment in jail for a term not expending ninety (90) days, or both. With respect to violations of this Code that are continuous with respect to time each day the violation continues is a separate offense.

* * * *

Sec. 15-3. Penalty.

Violations of this Chapter are punishable as provided in Section 1-8 of the Aztec Code.as provided in Section 1-5 of the Aztec Code.

* * * *

Sec. 15-4. Definitions.

(7) Security. Security of location and equipment shall be required for major and minor oil and gas facilities and includes:

(a) Temporary fencing at least four (4) feet high of barbed wire or other fencing

equally acceptable during the drilling, construction, work-over or completion of the oil and gas facility, and

(b) Permanent perimeter fencing at least six (6) feet high with a single strand of barbed wire and locked gating for all facilities after construction and for the duration of operating oil and gas facility.

* * * *

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

[Filed October 14, 2008]

Supreme Ct. No. ____
Ct. App. No. 27,489
Dist. Ct. No. D-0101-CV-2004-0242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, deceased
Plaintiff-Respondent,

v.

ENERGEN RESOURCES CORPORATION,
Defendant-Petitioner.

ENERGEN RESOURCES CORPORATION'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

BRADFORD C. BERGE
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TEL: (303) 295-8500

Attorneys for Defendant-Petitioner Energen Resources Corporation

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JURISDICTION

The Court of Appeals' opinion was filed September 22, 2008. *Exhibit A.* This petition is timely under Rules 12-502(b) and 12-308(a) NMRA.

QUESTIONS PRESENTED

1. Is a $13 million punitive damage award unconstitutionally excessive when (a) the Court of Appeals does not review it de novo, (b) it is tainted by impermissible considerations of non-parties' conduct and out-of-state conduct, and (c) the jury awarded substantial compensatory damages, indicating that a 1:1 ratio of punitive to compensatory damages is the constitutional limit?

2. When in closing argument, counsel misrepresents key facts that have been excluded by rules of evidence and an order in limine, does a trial court's mere admonition to disregard the comments cure the prejudice, or must the court either tell the jury the truth or declare a mistrial?

STATEMENT OF FACTS

On July 21, 2002, John Stapleton and Cody Amezcua drove to McCord 13, a gas wellsite leased by Energen from the Bureau of Land Management (BLM) in Glade Run, north of Farmington. Stapleton, driving with a suspended license and not keeping a lookout, backed into the wellhead. Both Stapleton and Amezcua died from the resulting explosion.

Like more than 90% of wellheads in Glade Run, McCord 13 was not fenced or barricaded. The liability portion of the trial focused on whether Energen should have fenced the well before the accident, even though fencing was not required by BLM and required BLM's permission.

Within two weeks after the accident, Energen fenced McCord 13, and Energen and other oil companies also fenced other wellheads. The trial court excluded this evidence under Rules 11-407 and 11-403 NMRA. Yet in closing argument, plaintiff's counsel repeatedly suggested that Energen had never fenced McCord 13, even though he knew this was false. He also falsely implied that neither Energen nor other companies fenced any other wellsites after the accident.

Energen moved for a mistrial, or in the alternative, a curative instruction telling the jury the truth: Energen had fenced the wellhead within two weeks of the accident. The trial court denied the motion, and instead, merely instructed the jury to disregard counsel's remarks.

The jury allocated 65% of the fault to Energen and 35% to Stapleton. Despite this split liability verdict, the jury tagged Energen with $13 million in punitive damages—almost 7 times compensatory damages. Energen appealed from the denials of its motions for a mistrial, a new trial, car a remittitur based on counsel's false and prejudicial closing arguments and the unconstitutionally excessive punitive damage award. The Court of Appeals affirmed.

BASIS FOR GRANTING THE WRIT

This Court should grant certiorari to review important issues concerning the constitutionality of the punitive damage award. Both the United States Supreme Court and this Court require that courts review such awards de novo. The Court of Appeals did not apply this standard.

In analyzing the reprehensibility of Energen's conduct, the court permitted the award to be based

on impermissible factors. The court relied heavily on the harm to the victim, and it permitted the jury to consider the conduct of third parties and out-of-state conduct by Energen's sister subsidiary that harmed non-parties.

Further, the Supreme Court has warned that when compensatory damages are substantial, as here, a 1:1 ratio of punitive to compensatory damages might set the "outermost limit of the due process guarantee." In *Exxon,* with sweeping dicta that invoked its constitutional jurisprudence, the Court set a 1:1 limit in maritime cases. This case raises the question whether the constitutional limit is also 1:1.

The Court should also grant certiorari to decide whether, when counsel misrepresents excluded evidence in closing argument, an instruction to disregard cures the prejudice. The Court of Appeals opinion conflicts with its own precedent, where it held that a mere instruction to disregard is insufficient. The trial court struggled over this issue too, calling it a close, important question. This Court should resolve the conflict and provide needed guidance.

ARGUMENT

I. THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

The $13 million punitive damages award is unconstitutionally excessive and the inevitable result of counsel's prejudicial closing remarks. In holding to the contrary, the Court of Appeals applied the wrong standard of review; endorsed punishing Energen for non-parties' conduct and out-of-state conduct; disregarded the constitutional limitation on punitive damages when compensatory damages are significant; and overlooked comparable civil penalties.

A. The Standard Of Review Is De Novo.

"The Eighth and Fourteenth Amendments to the federal Constitution prohibit punitive damages awards that are 'grossly excessive.' *Bogle v. Summit Inv. Co., LLC,* 2005-NMCA-024, ¶33, 137 N.M. 80 (quoting *Cooper Industries v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 434 (2001)). Appellate courts must use three guideposts in determining whether a punitive damage award satisfies due process: (1) the degree of reprehensibility of defendant's conduct; (2) the disparity between the harm or potential harm to plaintiff and the award; and (3) the difference between the award and civil penalties authorized in comparable cases. *BMW of N. Amer., Inc. v. Gore,* 517 U.S. 559, 574-75 (1996).

In applying this test, courts as a matter of "federal constitutional imperative" must review punitive damage awards de novo, making, an "independent assessment of the record." *Aken v. Plains Elec. Gen. & Transmission Coop., Inc.,* 2002-NMSC-021, ¶¶17, 19, 132 N.M. 401 (citing *Cooper Industries*, 532 U.S. at 436). This de novo review must be "exacting". *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 418 (2003). Notwithstanding this clear constitutional edict, the Court of Appeals, after citing *Aken*, limited its review, stating:

> [O]ur review is not truly de novo review. . . . In this de novo review we do not ourselves determine the actual award of punitive damages. Thus, we preserve the constitutional right of the parties to have the jury decide the case. . .

Slip Op. 16-17. This was error. The amount of punitive damages is not a "fact" tried by the jury, and no party has a Seventh Amendment right to have a jury

decide this issue. *Cooper Industries,* 532 U.S. at 437. The Court should grant certiorari to reaffirm the appropriate standard of review and clarify that courts must independently assess the appropriate amount of punitive damages.

B. The $13 Million Award Was Based On Impermissible Evidence Of Reprehensibility.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. The Supreme Court has instructed courts to evaluate reprehensibility by considering whether

> [a] the harm caused was physical as opposed to economic; [b] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [c] the target of the conduct had financial vulnerability; [d] the conduct involved repeated actions or was an isolated incident; and [e] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419. The Court of Appeals, however, based its ruling on improper considerations and misapplied these factors.

First, the court noted that in evaluating reprehensibility, "we compare the [punitive] damages to the enormity of defendant's wrong *apart from the actual injury sustained.*" Slip. Op. 17 (emphasis in original). Yet the court began its reprehensibility analysis by describing the injury and citing expert testimony that burning to death is "one of the most horrific ways to die." *Id.* at 18. It added that "Defendant's conduct resulted in excruciating physical harm

and death." *Id.* at 19. This was a constitutionally invalid basis for upholding a punitive damages award.

Second, the Due Process Clause forbids using punitive damages to punish defendants for harm they inflict on nonparties. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-64 (2007). *A fortiori*, the Constitution forbids punishing defendants for harm *someone else* may inflict on nonparties. *See Viekrey v. Dunivan*, 59 N.M. 90, 94, 279 P.2d 853, 856 (1955) (defendant cannot be assessed punitive damages for co-defendant's conduct). Nor can a state generally punish defendants for out-of-state conduct. *Campbell*, 538 U.S. at 421.

Here, plaintiff's counsel exhorted the jury to base its award on precisely these improper considerations. Throughout trial, counsel urged the jury to punish Energen for conduct of *other companies* and conduct occurring in *another state* and injuring *nonparties*. In opening statement, he focused on dissimilar incidents involving Alagasco—Energen's sister subsidiary—in which cars hit residential gas lines in Alabama in the early 1980's. Tr.(11/27/06) 31:8-21. Energen did not contest notice at trial, so this evidence was irrelevant for all purposes, including punitive damages. Energen moved in limine to exclude it, but the trial court admitted it. R.P. 1761. In closing, counsel emphasized—in violation of the order in limine—that companies other than Energen failed to erect fences in Glade Run after the accident, and he urged the jury to send a message to those companies. Tr.(12/6/06) 495:17-25. The Court of Appeals inexplicably ignored these errors, which alone compelled the court to jettison the punitive damages award.

Third, the Court misapplied the *Gore* factors in concluding that Energen's conduct was at the high end of reprehensibility. Slip. Op. 22. The Court acknowledged that factors (c) and (e) did not exist—Stapleton was not financially vulnerable and the harm was not the result of malice, trickery, or deceit. Slip Op. 18. But it erred in analyzing the remaining factors.

With respect to factor (b), the court relied on the fact that "from the time [Energen] acquired its wellheads in 1997 until the accident in 2002, it took no action to protect wellheads, despite its knowledge that excruciating physical harm and death could result by its inaction" Slip Op. 19. But the court disregarded undisputed evidence that this was an isolated incident. Over 2.5 million people had driven by wellsites in Glade Run over the prior decade, yet there had never been an accident where a vehicle hit a wellhead and caused an explosion. Tr.(11/28/06) 117:18-119:14. In fact, no such accident had occurred in the San Juan Basin for at least 50 years. *See* Tr.(12/05/06) 312:22-313:3.

As for factor (d), the court concluded Energen's conduct was repetitive based solely on dissimilar acts of Alagasco. Slip Op. 19. These acts, however, cannot be used to punish Energen. *See infra* at 6-7.

Only factor (a) existed—the harm caused was physical. But even this was tempered by the fact that two-thirds of the compensatory damages awarded were economic (lost wages, benefits, and household services). And the existence of any one factor may not be sufficient to sustain a punitive damage award. *Campbell*, 538 U.S. at 419. This Court should grant certiorari to clarify the nature and scope of a constitutionally-sound reprehensibility analysis.

C. Because Compensatory Damages Were Substantial, A 1:1 Ratio, At Most, Was Appropriate.

Under the second *Gore* guidepost, courts must compare the compensatory and punitive damage awards. While declining to establish a bright-line rule, the Supreme Court has instructed that a 4:1 ratio is close to the constitutional line, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell,* 538 U.S. at 425. Recently, in *Exxon Shipping Co. v. Baker.* 128 S.Ct. 2605 (2008), the Supreme Court described the ratio calculus as "a central feature in our due process analysis," *id.* at 2629, and twice emphasized its statement in *Campbell* that when compensatory damages are substantial, a 1:1 ratio may be the constitutional limit. *Id.* at 2626, 2634. The evolution of the Supreme Court's Due Process analysis undeniably points to a maximum 1:1 ratio in cases involving substantial compensatory damages.

Notably, in *Campbell,* the high court deemed a $1 million compensatory damages award to be substantial. Here, the jury awarded compensatory damages of almost $2 million, after allocation of fault. It then awarded $13,000,000 in punitive damages, yielding a ratio of 6.76:1. *See Phelps v. Louisville Water Co.,* 103 S.W.3d 46, 54 (Ky. 2003) (comparing punitive and compensatory damages awards "after apportioning for relative fault"). Because compensatory damages were substantial, even a 1:1 ratio would push the constitutional envelope. Indeed, in recent, post-*Exxon* cases involving substantial compensatory damages, courts (citing *Exxon)* have applied this rationale in

reducing punitive damages to amounts equal to compensatory damages. *E.g., Adidas America, Inc. v. Payless Shoesource, Inc,* 2008 WL 4279812 (D.Or. Sept. 12, 2008); *Security Title Agency Inc. v. Pope,* 2008 WL 2895939 (Ariz. App. July 29, 2008).

The Court of Appeals neither acknowledged nor addressed this issue. Instead, relying on cases involving malice and bad faith, it held that Energen's conduct warranted a higher ratio. Slip. Op. 22. But this case involves no such conduct, *see infra* at 7, and the court erred by conflating the reprehensibility analysis with the ratio analysis.

Because compensatory damages were substantial, this case squarely raises the constitutional question whether punitive damage must be limited, at most, to the amount of compensatory damages. The Court should grant certiorari to decide this issue of great public importance.

D. The Punitive Damages Award Exceeded Comparable Civil Penalties By 26,000 To 1.

Finally, the Court of Appeals erroneously treated the third *Gore* guidepost as irrelevant. Slip Op. 22-23. Energen showed that the closest comparable civil penalty was the failure to fence a wellsite in nearby Farmington and Aztec: $500. R.P. 11:2577-84. This penalty indicates the local governments' views of the hazard. The ratio between the $13 million punitive damages award and the comparable civil penalty is thus a breathtaking *26,000 to 1.* Under this guidepost, the award is patently excessive. *See Gore, 517* U.S. at 583-85 ($2 million punitive award severe compared to $5,000 - $10,000 penalties); *Campbell,* 538 U.S. at 428 $145 million award "dwarfed" $10,000 penalty). The Court should grant certiorari

to affirm the relevance of this third guidepost in New Mexico.

II. COUNSEL'S IMPROPER CLOSING ARGUMENT DEPRIVED ENERGEN OF A FAIR TRIAL.

Arguments of counsel require a new trial when they are (1) improper and (2) reasonably calculated to cause, and probably did cause, rendition of an improper judgment. *Benavidez v. City of Gallup* 2007-NMSC-026, ¶16, 141 N.M. 808. In deciding this issue, this Court reviews for abuse of discretion. *See Enriquez v. Cochran,* 1998-NMCA-157, ¶131, 126 N.M. 196.

A false statement of fact in closing argument is unfairly prejudicial because it leaves jurors with a "palpably inaccurate impression" of the facts. *Enriquez* ¶134. A false implication "is more deserving of condemnation when the actor knows that the implied fact is untrue. And so the inclination of a court to find prejudicial error in such a situation is more readily stimulated." *Id.* (citation and quotation marks omitted); *accord* Rule 16-303(A)(1) & (4) NMRA (lawyer "shall not knowingly make a false statement of material fact or law to a tribunal" or "offer evidence that the lawyer knows to be false"); *In re Righter,* 1999-NMSC-009, ¶¶9, 21, 126 N.M. 730 (indefinite suspension for violating this rule).

The Court of Appeals confronted such a scenario in *Enriquez.* There, defense counsel falsely implied during closing argument that his client could not pay a judgment. *Enriquez,* ¶¶132-34. Plaintiff objected and requested a curative instruction telling the jury the truth —defendant had insurance. *Id.*, ¶137. The trial court declined and merely instructed the jury to

disregard the remarks. *Id.*, ¶136. The Court of Appeals reversed, holding that counsel's remarks left a "palpably inaccurate impression with the jury" regarding a key fact in assessing damages. *Id.*, ¶¶133-34. Moreover, the admonition to disregard "was insufficient to meet the false impression left by Counsel's statement[s]." *Id.*, ¶¶136-38. Although the remarks were directed at damages, the court ordered a new trial on all issues. *Id.*, ¶¶135-39.

Here, on four separate occasions during closing argument, plaintiff's counsel indicated that Energen had not fenced McCord 13 after the accident. *See* Slip Op. 6-9 (quoting counsel's remarks). Consistent with the order in limine, which applied to both parties, Energen's counsel appropriately avoided objecting to (and thus highlighting) these remarks before the jury. *See Joseph v. Brierton*, 739 F.2d 1244, 1247 (7th Cir. 1984) (counsel entitled to postpone objection to remarks violating order in limine until end of closing argument).

But during a break after plaintiff's counsel's third false remark, Energen moved for a mistrial. Tr.(12/6/06) 497:19-498:1. The court agreed that the arguments were improper but refused to declare a mistrial or give a curative instruction telling the jury that Energen had fenced the site, *Id.* at 499:7—502:8. Instead, it admonished the jury to disregard the remarks because "there is no evidence before you on that issue." *Id.* at 502:2-8. Despite this admonition, counsel was undeterred; in rebuttal, he repeated that Energen had failed to barricade its wellsite "even as of right now. *Id.* at 525:16-20. Counsel knew these statements were false. *See* R.P. 8:1899; 11:2690 n.1.

In ruling on post-trial motions, Judge Hall found that plaintiff's counsel "clearly inferred" Energen had not fenced McCord 13` "even up to the time of trial," that he thus violated the order in limine, and that the prejudice to Energen warranted a curative instruction, Tr.(2/1/07) 13:19 - 14:21. The judge noted that the verdict would stand or fall on the close question of whether his admonition cured the prejudice:

> Frankly, I think the Plaintiff's verdict here stands or falls on the sufficiency of the admonition that the Court gave. I think it's a close question, important, and [an] interesting appellate issue.

Tr.(2/1/07) 15:9-12 (emphasis added). Given its predicate findings, the court should have resolved this close question in Energen's favor. *Enriquez*, ¶¶136-38; *Joseph*, 739 F 2d at 1248; *see Beal v. S. Union Gas Co.*, 66 N.M. 424, 434-35, 349 P.2d 337, 344-45 (1960) (approving admonition instructing jury to disregard pieces of rusty pipe brought to courtroom *and* advising jury that pipe was not involved in disputed gas explosion).

Even though *Enriquez* was the centerpiece of Energen's mistrial argument, the Court of Appeals failed to cite the case, much less address it. Instead, the court opined that the false impression counsel created did not deprive Energen of a fair trial given that 28 witnesses testified and numerous exhibits were admitted, Slip Op. 14-15. The court's message to New Mexico lawyers is that so long as there is sufficient evidence to support a verdict, trial misconduct—no matter how egregious—is excusable.

The court also relied on the general principle that juries are presumed to follow a court's instructions.

Id. at 15. But it never addressed how specific the instruction must be when counsel misrepresents a critical fact in closing. In that regard, there is a conflict between the court's opinions here and in *Enrique:*. This Court should grant certiorari to resolve this conflict and review, as the trial court put it, this close, important question.

PRAYER FOR RELIEF

The Court should grant certiorari and order a new trial on all issues, a new trial on damages, or a remittitur of the punitive damage award.

STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Rule 12-512(E), the undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Rule 12-512(D)(3) in that it contains 3,149 words in a proportionately-spaced type. This word count was obtained using Microsoft Office Word 2003.

Dated October 14, 2008.

Respectfully Submitted,

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By: /s/ [Illegible]

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APPENDIX H

On the 13th day of July 2007, the Official Court Reporter for the First Judicial District Court filed in the Office of the Clerk of the Court a Transcript of Proceedings on Appeal to the NEW MEXICO COURT OF APPEALS.

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

Case No. D-0101-CV-200400242

VAL JOLLEY, Personal Representative
of the Estate of JOHN EVERETT
STAPLETON, Deceased,
Plaintiff,

vs

ENERGEN RESOURCES CORPORATION,
Defendant.

TRANSCRIPT OF PROCEEDINGS
Volume I

On the 27th day of November 2006, at approximately 8:55 a.m., this matter came on for hearing on a JURY TRIAL, before the HONORABLE JAMES A. HALL, Judge of the First Judicial District, State of New Mexico, Division II.

The Plaintiff, VAL JOLLEY, appeared by Counsel of Record, TERRY R. GUEBERT and DON G.

BRUCKNER, JR., Guebert, Bruckner & Bootes, P.C., Attorneys at Law, Post Office Box 93880, Albuquerque, New Mexico 87199.

The Defendant, ENERGEN RESOURCES CORPORATION, appeared by Counsel of Record, BRADFORD C. BERGE and TRENT A. HOWELL, Holland & Hart, L.L.P., Post Office Box 2208, Santa Fe, New Mexico 87504.

	Report	TR-7
22.	Proposed Glade Run Trail System, Off-Highway Vehicle, Farmington Resource Management Plan Amendment/ Environmental Assessment, NM070-95-3219 dated September 1995 (Excerpts)	TR-7
23.	Proposed Glade Run Trail System, Recreation Area Management Plan and Environmental Assessment, NM070-95-3220 dated October 1995 (Excerpts)	TR-7
24.	Final Decision Record, Glade Run Trail System, Farmington Resource Management Plan Off-Highway Vehicle Amendment and Recreation Area Management Plan dated May 29, 1996 (Excerpts)	TR-7
25.	Incident Reports, Department of Transportation	TR-7
31.	Energen Safety Handbook, October 2003	TR-7
32.	Energen Employee Safety Manual, January 19, 2004	TR-7
33.	Diagrams, measurements and photographs by J.T. Hayes	TR-7

36.	Maps of the Glade Run Special Management Area	TR-7
37.	Map of the Glade Run Recreation Area	TR-7
38.	PNM Aerial Photograph, Sheet 19, pre 1962	TR-7
39.	USDA-Natural Resources Conservation Service (NRCS) 1962 resource maps, map legend: 8-14-62 (for the date of flight and photography) and EKV-1CC-185 (for the grid location)	TR-7

* * * *

[306] those recited by Mr. Bruckner?

MR. HOWELL: Yes, Your Honor.

THE COURT: Those exhibits will be admitted into evidence.

(Note: Plaintiff's Exhibit Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 46 admitted into evidence.)

THE COURT: Can we quickly do a similar exercise with the Defendant's exhibits and get those in?

MR. BERGE: May I approach, Your Honor?

THE COURT: Yes.

MR. HOWELL: So, Your Honor, going—

THE COURT: Let me ask, the ones that are actually listed here, are those the ones that you believe are agreed to?

MR. HOWELL: That's correct, Your Honor. We've actually whited-out the description of the ones that haven't been agreed to.

MR. BRUCKNER: Actually is A listed on—

MR. HOWELL: It's—yeah, A is still listed on there. I'm sorry, we got—that's one. Okay.

THE COURT: Well, let me, then—do you have a list there, Mr. Bruckner? Let me try to recite the ones that it appears you've agreed to. Defendant's Exhibit B, D—do you need a minute?

[306] wells in 1997, and were not acquired—and were not fenced or barricaded prior to the explosion in July of 2002.

Ladies and gentlemen, the natural gas wellhead at McCord 13 is a pressurized natural gas system. There will be evidence in this case that Energen was aware of the hazard posed by a motor vehicle hitting a pressurized natural gas system before it purchased the 1,000 wells in the San Juan Basin in 1997. Specifically, on October 7th, 1982, in Moody, Alabama, a vehicle skidded off wet pavement and broke a service line, causing gas to escape. The gas ignited, but there was no explosion. There was no property damage, and there was no injury.

However, on December 28th, 1983, in Hoover, Alabama, an automobile left the road, hit a house, and landed on the pressurized natural gas service regulator. The escaping gas ignited and burned the car and its only occupant. The occupant died. In both of these incidents, the natural gas operator was Alabama Gas Company, also known as Alagasco. Alagasco is a subsidiary of Energen. Thus, the evidence will indicate that Energen, through its subsidiary, knew of a death where a vehicle came in contact with a pressurized natural gas system. That death occurred 19 years before the explosion in July 2002 at McCord 13.

From August 1997, when Energen purchased its wells in the San Juan Basin, until the explosion in July 2002, Ernest Cardona and Danny Button were the Energen employees primarily responsible for servicing the well at McCord 13. Now, ladies and

* * * *

DEPARTMENT OF TRANSPORTATION
LEAK REPORT—DISTRIBUTION SYSTEM

REPORT DATE: January 3, 1984

INSTRUCTIONS: Complete this side of this form for each incident regardless of cause. ... specific cause of leak or failure and complete the pertinent part(s) on the reverse side

☒ ... ☐ CONSTRUCTION DEFECT OR MATERIAL FAILURE—PART C ☐ OTHER (Explain narrative in detail in writing and attach to this form where parts are not applicable.)

... an applicable question is not available this should be stated. Only such portions of the form as apply to ... are to be completed. In all parts of the form which are not applicable, the letters "NA" should be inserted ... If additional instruction is needed to complete this form, the operator may telephone the Department ... Office of Pipeline Safety, Area Code 202, 962-6000, Monday through Friday, 8:30 A.M. to 5:00 P.M. Eastern Time.

GENERAL

840115

Name of operator: Alabama Gas Corporation 180
Street & number: 1918 First Avenue North
City, county: Birmingham, Jefferson
State, zip code: Alabama 35295
Telephone number: (205) 326-8100

Location of leak or failure:
Street & number: Route 3 Box 368
City, county: Moody, St. Clair
State, zip code: Alabama 35094

Date: 12-28-83 | Hour: 1900
Hours & minutes between time of detection & time escape of gas was stopped: 1 hour 7 minutes
Pressure at point and time of leak: 290 psig
Maximum allowable operating pressure (psig): 300 psig

Type of repair:
a. Pipe: (1) ☐ Weld over sleeve (2) ☐ Patch-welded (3) ☐ Clamp (4) ☐ Replace pipe (Length) ____ feet (5) ☒ Other repair or disposition (Specify) Replaced 1' of pipe on service riser and installed a new valve.
b. Component: (1) ☐ Replaced (2) ☐ Reconditioned (3) ☐ Other (Specify)

10. Personal injury or property damage resulting from escape of gas
a. Number of employee(s): None
(1) Fatalities: None
(2) Suffering lost time injuries: None
b. Number of non-employee(s)
(1) Fatalities: One
(2) Injured and requiring medical treatment other than on-site first aid: None

	Yes	No
c. Rupture occurred	(1) ☒	(2) ☐
d. Gas ignited	(1) ☒	(2) ☐
e. Explosion occurred	(1) ☐	(2) ☒
f. Incident induced any secondary explosions or fires	(1) ☐	(2) ☒

g. Estimated value of operator's property damage $ 100.00

Method of leak or failure detection:
Detected by: (1) ☐ Routine Maintenance survey (2) ☒ Outside party
Reported by: ☐ Operator personnel ☐ Agency causing damage ☐ Customer (4) ☐ Police (5) ☐ Public (6) ☒ Other (Specify) Fire Department

Part of system where leak or failure occurred: ☐ Main ☒ Service ☐ Other (Specify)

Part of system which leaked or failed: ☒ Pipe ☐ Valve ☐ Fitting (4) ☐ Drip (5) ☐ Regulator (6) ☐ Tap connection (7) ☐ Other (Specify)
Date installed: March, 1962

Material that leaked or failed: ☒ Steel ☐ Plastic ☐ Cast iron (4) ☐ Copper (5) ☐ Ductile iron (6) ☐ Wrought iron (7) ☐ Other (Specify)

Is adjacent material that leaked or failed the same material as adjoining pipe or component? (1) ☒ Yes (2) ☐ No

Metallurgical analysis planned? (1) ☐ Yes (2) ☒ No

Location of failure: ☐ Corrosion ☒ Other (Specify) Damage by automobile

Pipe/Service: Nominal size (inches): 3/4" | Nominal wall thickness (inches): .113
Specification: API5L | Grade: A-25

11. Environmental description
a. Predominant type of area: (1) ☐ Commercial (2) ☐ Industrial (3) ☒ Residential (4) ☐ Rural (5) ☐ Unknown (6) ☐ Other (Specify)
b. Predominant above-ground structure adjacent to leak

	Multi-story	Single story
(1) Commercial	a ☐	b ☐
(2) Industrial	a ☐	b ☐
(3) Residential	a ☐	b ☒
(4) Other (Specify)	a ☐	b ☐

c. Approximate distance to nearest above ground structure (Within 1 mile of leak): 20 feet
d. Did other underground facility(ies) contribute to occurrence of leak in any manner? ☐ Yes ☒ No
e. If so, what was effect of existence of other facility(ies)?
f. Was other utility(ies) impaired by the leak? (1) ☐ Yes (2) ☒ No
g. Distance of other facility(ies) or utility(ies) from leak or failure location: N/A

Other facility(ies) contributing to		Other utility(ies) impaired	
____ Ft. (1) ☐	Other gas	(8) ☐	____ Ft.
____ Ft. (2) ☐	Telephone	(9) ☐	____ Ft.
____ Ft. (3) ☐	Electric	(10) ☐	____ Ft.
____ Ft. (4) ☐	Sewers (Storm)	(11) ☐	____ Ft.
____ Ft. (5) ☐	Sewers (Other)	(12) ☐	____ Ft.
____ Ft. (6) ☐	Water	(13) ☐	____ Ft.
____ Ft. (7) ☐	Other (Specify)	(14) ☐	____ Ft.

h. Location of leak or failure: (1) ☐ Inside building (2) ☒ Above ground (3) ☐ Below ground (4) ☐ Below water (5) ☐ Below other paved area (specify) (6) ☐ Below walkway (7) ☐ Below road ☐ Paved ☐ Median or unpaved
i. Depth of cover: N/A inches
j. Soil information at pipe depth (1) ☐ Soil (2) ☐ Rock
(3) Estimated soil temperature at point of leak ____ °F

Additional description of incident or for continuation of explanation of items above:
The automobile involved left the road, hit the front of the house and landed on its roof on top of the H.P. service regulator. The escaping gas ignited and burned the car and its only occupant.

Name and title of reporting official:
James A. Martin
Vice President - Operations

Signature of reporting official: [signature]

PLAINTIFF'S EXHIBIT 25

S 00276

APPENDIX I

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PART—A CORROSION N/A

1. General corrosion information
   - a. Location
     - (1) ☐ Internal corrosion
     - (2) ☐ External corrosion
   - b. Description
     - (1) ☐ Pitting
     - (2) ☐ General
   - c. Cause
     - (1) ☐ Galvanic
     - (2) Bacterial
     - (3) ☐ Stray current
     - (4) ☐ Other (Specify) ______

2. Pipe coating information
   - a. Coating
     - (1) ☐ Bare
     - (2) ☐ Coated
     - (3) ☐ Wrapped
   - b. Year installed ______
   - c. Method of application
     - (1) ☐ Mill coated
     - (2) ☐ Yard coated
     - (3) ☐ Field coated
     - (4) ☐ Unknown
   - d. Material
     - (1) ☐ Coal tar
     - (2) ☐ Asphalt
     - (3) ☐ Wax
     - (4) ☐ Prefabricated film
     - (5) ☐ Thin film coatings
     - (6) ☐ Other (Specify) ______

3. Cause of coating failure
   - a. ☐ Damage
   - b. ☐ Defective material
   - c. ☐ Defective application
   - d. ☐ Decomposition
   - e. ☐ Other (Specify) ______

4. Cathodic protection
   - a. ☐ Yes
   - b. ☐ No
   - c. Year started ______
   - d. Type
     - (1) ☐ Impressed
     - (2) ☐ Galvanic
     - (3) ☐ Other (Specify) ______

5. Type of soil near leak

6. Soil resistivity
   - a. Last soil resistivity measurement in the area of the leak ______ (ohm-cm)
   - b. Date of measurement
   - c. Distance from leak (feet)

7. Pipe-to-soil potential
   - a. Last pipe-to-soil potential measurement at nearest points on each side of the leak ______ (volts) and ______ (volts)
   - b. Distances from leak to each measurement point ______ (feet) and ______ (feet)
   - c. Date of measurement

PART—B DAMAGE BY OUTSIDE FORCES

1. Primary cause of leak
   - a. ☐ Damage by equipment operated by or for operator
   - b. ☐ Damage by equipment operated by outside party
   - c. ☐ Damage by earth movement
   - d. ☒ Other (Specify) 3/4" H.P. service damaged by an automobile

2. Locating information for excavating and blasting incidents N/A
   - a. When leak resulted from damage by outside party's equipment, did the operator get prior notification that the equipment would be used in the area?
     - (1) ☐ Yes
     - (2) ☐ No
     - (3) Date
     - (4) Time
   - b. Was the pipeline marked or identified? (1) ☐ Yes (2) ☐ No
     - (3) If "Yes," what type of marking or identification was used to advise outside party of location of pipeline.
       - a. ☐ Permanent markers
       - b. ☐ Map furnished
       - c. ☐ Temporary stakes
       - d. ☐ Paint
       - e. ☐ Excavation
       - f. ☐ On site observation
       - g. ☐ Other (Specify) ______
   - c. Does statute or ordinance require the outside party to determine the location of pipelines
     - (1) ☐ Yes (2) ☐ No

3. Damage by earth movement N/A
   - a. ☐ Subsidence
   - b. ☐ Earthquake
   - c. ☐ Land slide
   - d. ☐ Washout
   - e. ☐ Other (Specify) ______
   - f. Was the earth movement caused by direct or indirect action by others? (1) ☐ Yes (2) ☐ No (If "Yes" explain below)

N/A

PART—C CONSTRUCTION DEFECT OR MATERIAL FAILURE N/A

1. Primary cause of leak
   - a. ☐ Construction defect
   - b. ☐ Material failure

2. Pipe class (If applicable)
   - a. Steel
     - (1) ☐ Seamless
     - (2) ☐ Electric resistance welded
     - (3) ☐ Submerged arc welded
     - (4) ☐ Butt welded
     - (5) ☐ Furnace-lap welded
   - b. Plastic
     - (1) ☐ Thermoplastic
     - (2) ☐ Thermosetting
     - Reinforced ((1) or (2)) a ☐ Yes b ☐ No
   - c. Cast iron
     - (1) ☐ Centrifugally cast
     - (2) ☐ Pit cast
   - d. ☐ Other pipe material (Specify)

3. Original test data

Was this facility strength proofed or leak tested at the time of installation?

a ☐ Yes b. ☐ No c. ☐ Not known

If "Yes" was test medium:

(1) ☐ Air (2) ☐ Gas (3) ☐ Water (4) ☐ Other (Specify) ______	(5) Date of test	(6) Minimum test pressure (psig)	(7) Time held at test pressure (Hours)	(8) Estimated test pressure at point of leak (psig)

4. Subsequent test data

Have there been later strength proof or leak test made? a. ☐ Yes b. ☐ No c. ☐ Not known

If "Yes," Was test medium:

(1) ☐ Air (2) ☐ Gas (3) ☐ Water (4) ☐ Other (Specify) ______	(5) Date of test	(6) Minimum test pressure (psig)	(7) Time held at test pressure (Hours)	(8) Estimated test pressure at point of leak (psig)

S 00277

DEPARTMENT OF TRANSPORTATION

LEAK REPORT—DISTRIBUTION SYSTEM

Report Date: October 11, 1982

821402

GENERAL

Alabama Gas Corporation 20180

1918 First Avenue North

Birmingham Jefferson

Alabama 35293

(205) 326-8100

1753 Patton Chapel Road

Hoover Jefferson

Alabama 35226

Date	Time	Hours & minutes
10/7/82	0757	30 minutes

Pressure (psig): 120 / 175

Date installed: August 1977

Damage by Auto

Size: 3/4" — Wall thickness (inch): .113

API 5L — Grade: A-25

Type of repair: Threaded pipe and replaced 3/4" U.P. service cock

Number of employees: None

(1) Fatalities: None

(2) None

Number of non-employees:

(1) Fatalities: None

(2) Injured and requiring medical treatment other than on site first aid: None

Estimated value of operator's property damage $ 100.00

Approximate distance: 45

Distance of other facilities from leak or failure location: N/A

Depth of cover: N/A inches

Estimated soil temperature at point of leak: N/A

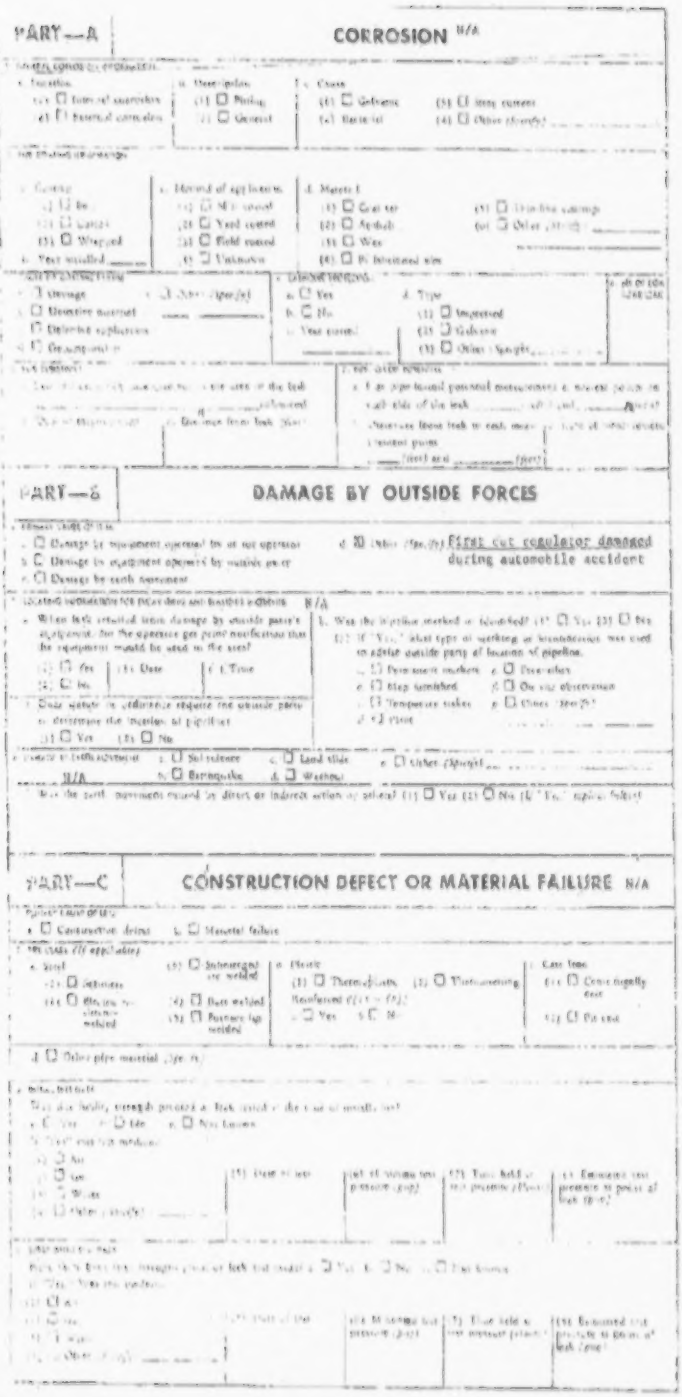
Automobile skidded off wet pavement and broke 3/4" H.P. service line below valve. Police rerouted traffic due to escaping gas.

W. H. Donovan, Jr.

Manager - Technical Services

S 00296

91a



PART—A CORRESPONDENCE N/A

PART—B DAMAGE BY OUTSIDE FORCES

PART—C CONSTRUCTION DEFECT OR MATERIAL FAILURE N/A

APPENDIX J

On the ___ day of JULY 2007, the Official Court Reporter for the First Judicial District Court filed in the Office of the Clerk of the Court a Transcript of Proceedings on Appeal to the NEW MEXICO COURT OF APPEALS.

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

COA No. 27,489
Case No. D-0101-CV-200400242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased,
Plaintiff,

vs.

ENERGEN RESOURCES CORPORATION,
Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 29th day of November 2006, at approximately 9:10 a.m., this matter came on for hearing on JURY TRIAL before the HONORABLE JAMES HALL, Judge of the First Judicial District Court, Division II, State of New Mexico.

The Plaintiff, Val Jolley, appeared in person and by Counsel of Record, TERRY GUEBERT and DON BRUCKNER, Attorneys at Law, GUEBERT, BRUCKNER & BOOTES, P.C., P.O. Box 93880, Albuquerque, New Mexico 87199-3880.

[2] The Defendant, Energen Resources, appeared by Counsel of Record, BRADFORD BERGE and TRENT HOWELL, Attorneys at Law, HOLLAND & HART, LLP., P.O. Box 2208, Santa Fe, New Mexico 87504-2208.

At which time, the following proceedings were had:

* * * *

[96] inflation and productivity growth.

Q. But where do you get, like, for example, an inflation figure of 1.1 percent?

A. Yeah, the way I do it is to look at the financial markets and look at the current situation we're seeing in terms of the financial markets where the financial markets—particularly, if you take municipal bonds as an example. It's the same thing. Here we're dealing with labor markets. In terms of if I'm an investor in a municipal bond, I expect a real return, an ability to buy more goods and services later on as well as compensation for the erosion in the value of money, which is called inflation. And so I looked at the financial markets in terms of what current interest rates were which, at that time, was 4.1 percent. What we absorbed over the recent past is the real return that people expect is around 3 percent and that would apply to me that the inflation rate that people expect is 1.1 percent over the foreseeable future.

Q. All right. And then you've got C, D and E there are Federal, state and Social Security taxes, correct?

A. Correct, because again, I think it's by statute in New Mexico, if there is an award in a case like this, the award is what would have been available to somebody and, of course, taxes are taken out before you get to disposable income. And so I looked at the income that—anticipated that John Stapleton would

have earned and those are the appropriate average Federal tax [97] rates, state tax rates and Social Security contributions.

Q. That you would deduct in order to reach a fair conclusion?

A. Right. In terms of if you start with a sort of gross income loss and you end up with a net income loss after these adjustments.

Q. Then you've got fringe benefits. You've got 20 percent of gross income loss?

A. Right, and that's been interesting based upon information I received more recently. But for someone that anticipates a union career, that kind of situation, 20 percent is a fairly conservative estimate of fringe benefits. The legally required fringe benefits, which would be unemployment compensation, Social Security contributions by your employer, and worker compensation is about 11 percent. So this would just reflect an amount above and beyond that to reflect some health insurance or whatever. It turns out based on Alan Myers' deposition that the fringe benefits of boiler makers are pretty astonishing. They can run as high as 75 percent.

So probably, if I had known that at the time I did the report, I maybe would have adjusted that figure up somewhat. But this is a good standard for someone in his income category.

Q. Now, by using 20 percent of gross income loss for fringe benefits in light of the testimony of 75 percent by Mr. Myers, would your numbers be considered more conservative in that—[98] considering those two facts?

A. The report, as presented here, would be conservative relative to those figures.

Q. All right. Then loss of household services, you've got at replacement value. What are loss of household services?

A. Again, the framework by law in New Mexico is the loss that's been experienced due to someone's death. In addition to earning income, somebody would also would have provided household services to themselves and those around them. And there are studies of the range of services that men and women provide in the home and then the people that-have—scholars who have done these studies impute some value to the services that these people would have provided and come up with, essentially, the value of their household services.

So this is at replacement value means it would be if you had—if someone used to do some electrical work around the house, what would it cost to get an electrician to do that work. That kind of thing. So that's the overall range of what people would have done and the value of those activities if you had to hire somebody else to do them.

Q. And, of course, since John Stapleton is now dead and we'll never know what he would have actually done around the household, what are you doing here?

A. Yeah. Again, I'm just using an average of men in the United States.

[99] Q. And then you've got a discount rate. And that's what you were talking about the last step in your analysis?

A. Correct.

Q. Why do you use a 4.1 percent discount rate?

A. Well, the idea would be if the jury were to conclude, just to keep it fairly straightforward, is that there's a loss of $1,000 next year. Next year. Then

you could give somebody less than that now, prudently invest it. That would generate the thousand dollars next year.

So, for example, not that the 4.1 percent here, but let's say to make it a simple example, if you could get 11 percent return on investment, then I could give somebody $900 this year, prudently invest it at 11 percent. If they went back next year to wherever they deposit the funds, the $900 plus the accrued interest of $100, 11 percent, would provide them with the $1,000.

So the idea would be if there are losses in the future, and particularly with a young man like John Stapleton, there will be losses over his expected lifetime. Then you have to convert those losses that potentially are way out there back to the amount now necessary prudently invested that will generate those future losses. And the interest rate I use, and I think most economists use, is a municipal bond rate because it's not risky, and it's also generally tax free so you don't have to consider tax repercussions of it.

And at the time I wrote the report a little over a year [100] ago, municipal bonds at that time were yielding about 4.1 percent.

Q. Is it substantially different as of today?

A. It's a little bit higher. I mean, interest rates are extremely low, by historical experience, for a variety of reasons. But it's a little bit higher than that but not much higher.

Q. Now, the fact that it's higher today, would that make your economic calculation, again, more conservative?

A. Well, in part what would happen, though, is the question would be why are interest rates higher. Part

of the reason why interest rates would be higher is because financial markets are anticipating more inflation. If they're expecting more inflation, I would also probably kick up the wage thing. So sort of a wash on that aspect of the report.

Q. All right. Now, in the numbers we're going to look at now, though, you've done all the calculations or a computer has, I suspect. I don't know.

A. I told the computer what to do.

Q. Now, let's go through it across a couple of lines, then we'll go to the bottom line. Tell us what this is and what you did.

A. Okay. So what we have in these columns is initially we have the year 2002. That's the year that John Stapleton—I guess he had already turned 19. And then we have—at that time he's working at a job that paid about $8 an hour. So, in fact, what we're picking up there in that particular column is probably [101] the only one I have to discuss in a little bit more detail. Because he had already applied for an apprenticeship in the boilermaker's union and had a grandfather and two uncles already in that career, I assumed that he would be accepted into the apprenticeship program starting with the beginning of 2003. So I assumed that he would continue in the job he had at the time of his death, which paid $8 an hour.

Then starting in January of 2003, I would assume that he started as an apprentice in the boilermaker's union, both in terms of their documents and also the "Occupational Outlook Handbook" said that it is about a four-year program. People in the "Occupational Outlook Handbook," they said they start about 50 percent of journeymen. And I had data from the U.S. government on what journeymen made. They start at 50 percent, and over a four-year period, they go up to what a journeyman makes.

Mr. Meyers' deposition testimony is that the local union here—they actually started at 70 percent and go up. But the U.S. government data said they start at 50 percent. So what I have was that in 2002, during the remainder of 2002, he would have earned $8 an hour. Then he would have started an apprenticeship program, which would have lasted four years. He would have started at one-half of what journeymen made and would gradually increase over that four-year period to what journeymen did make. And then after that, I assumed he would be a journeyman boiler maker for the rest of his career.

[102] So that column, I think, is the only one I need to explain more about. In the next column on deductions, I deducted Federal, state taxes and Social Security to end up with a net income loss. Fringe benefits, I assumed, were 20 percent of the gross income, and then I also provided for household services at the replacement value. And then the last column in the upper part is personal maintenance, which is from a U.S. government document on budgets that people need to sort of maintain a minimal lifestyle but a reasonable lifestyle.

And so then in that particular column, I take the amount that he would need for personal maintenance, and so I take those and I adjust them over time for inflation and in the case of income loss for wage increases. And then the bottom area we have four important components converted to a present value. We have personal maintenance converted to a present value. We have income loss, fringe benefit loss and household services loss all converted to their value in 2005. And then the bottom calculation, which would be at the bottom, will consist of taking the income loss, the fringe benefit loss and the

household services loss and subtracting from that the value of the personal maintenance.

Q. Now, reading across the—what are positives and negatives when you go through this thing?

A. Yeah. In fact, there's a little bit of a gap on the top, which is helpful. You have—you take—if you go to the[103] middle of the top, you have net income loss, fringe benefits, and household services. Those are the value of things that John Stapleton would have generated if he lived. And from that you subtract an income that it would be adequate to maintain him at a fairly modest income level.

Q. That's the personal maintenance?

A. That's the personal maintenance. So you add up the three components of what he would have produced that did not get produced because of his death and you subtract from that what he would have used up, which is reflected in personal maintenance.

Q. All right. Now, let's look down to—let's go down to year 2046, and again, if you can just kind of — now, the only problem with it is we can't see the top so you'll have to tell us because we can't read-across—there you go. All I got to do is ask. They don't quite line up so you talk to us as we go across, but let's talk about it. Now, in 2046, might as well take, yeah, 2046. I know it says age 63 and you were talking 57, but let's use this for example, okay?

A. Yeah. If I can editorialize?

Q. Sure.

A. Is that on the one that's obscured now? There are two sort of floating numbers over on the right-hand side that occur at age 57, and they reflect the income loss and the fringe benefit loss through that work life expectancy. What we're looking at here would be the loss if he had worked through age 65.

* * * *

[114] economic calculations, if he worked to age 58, was about 1.4 million; is that correct?

A. That's correct.

Q. And if he went on to age 65, it's about 1.6 million?

A. That's correct.

Q. That's inclusive of—those numbers are the bottom line, aren't they, to all these other calculations?

A. Correct.

Q. Let's talk about some of the individual categories. So, Dr. Parkman, you've got net income loss as one of the figures that's calculated totaled and then sent to present value, right?

A. Just to be clear on it, each individual year is converted to a present value before there is a total.

Q. Sure. And what you're saying is that, for example, net income loss is gross income loss minus deductions for that year, and then you run that over in separate columns as present value and you total those, and that's where we are total?

A. That's correct.

Q. You took this figure—you took the $46,000 a year figure from a national average that boilermakers earn in the United States; isn't that correct?

A. That's correct.

Q. And that's boilermakers, period. That's not—you're not splitting out from that number foremen, journeymen, assistant foremen or anything. That's just boilermakers?

[115] A. The data was given to me as boilermakers.

Q. You would agree that most more experienced employees can earn higher than less experienced employees as a general proposition?

A. In other industries, yes.

Q. Boilermakers at—well, did you see the data Mr. Meyers provided indicating that foremen are at a higher rate than journeymen, for example?

A. That's more categories than just seniority he had—it's true when you make journeyman, that's going to be it for your career unless you do get promoted.

Q. But the national average, as you said, isn't one of journeyman, it's all boilermakers, correct?

A. Correct.

Q. So his beginning earnings could have been lower than the average boilermaker, correct?

A. Given the testimony of Mr. Myers, my figures are a little on the low side because I assume from the Occupational Outlook handbook where they said apprentices earn 50 percent. Mr. Meyers said they earn 70 percent of journeyman.

Q. But your $46,000 figure is not an apprentice figure.You said it was an average of all boilermakers, correct?

A. Correct.

Q. You're not telling the jury—you haven't viewed it as your expertise to say what, in fact, he would have earned, [116] correct? You made an assumption on that, but it's not your expertise, right?

A. Right.

Q. And, again, your calculations just tell us what would happen if we assume that and went through the full work expectancy?

A. Correct. I assume, using the national average for boilermakers, he would start at half of that, go up to the average, and then experience that average, adjust it for a wage increase over the rest of his career.

Q. But, Dr. Myers, this isn't half of the 46,000 is it? I mean, you assume that as soon as he got through

his apprenticeship program, he would be making a full 46,000?

A. Right. By that point, the figure's I had for 2004. So it had increased slightly by the time you got to 2007 anyway. But that's what I would assume he would make at average.

Q. The average for a boilermaker not for a beginner journeyman?

A. Correct.

Q. You were asked by the attorneys to assume a boilermaker occupation?

A. I think in our discussion we did. That was the case. But even if the interrogatories, which we had available at the time, and the deposition I had at the time, there were other sources that led me to that conclusion.

[117] Q. But, again, you're not an occupational consultant, a vocational consultant. You didn't look at his background, his credentials, his qualifications to decide that was the best occupation he qualified for?

A. No, I didn't.

Q. And you also saw or did you see the conflicting evidence as to other occupations he had expressed interest in going into before?

A. He had been in other occupations. I'm not sure I had evidence of other conflicting occupations he considered.

Q. You are aware that he wasn't employed as a boilermaker when he—at the time of the accident?

A. Correct.

Q. And you are aware that he wasn't even accepted in the apprentice program yet?

A. Correct. He had applied, but not been accepted.

Q. Do you know what kind of grades Mr. Stapleton made?

A. They weren't good.

Q. And are you aware that the apprenticeship program had a classroom component to it as well?

A. Yes.

Q. And reaching the 46,000 average for a boilermaker would have been contingent on him getting through that process, correct?

A. Right. And Mr. Meyers indicated, again, in the deposition, certainly, we have here a high school graduate; that [118] virtually nobody failed out of the program. So it would, certainly, apply to me—it, certainly, was rigorous, it was not that demanding.

Q. Dr. Parkman, you're not a boilermaker?

A. No.

Q. You're not in charge of overseeing that program?

A. No.

Q. And you're no expert on who's going to complete it and who's not?

A. No.

Q. You're not trying to tell the jury here that you have an opinion on whether John Stapleton would have completed that program?

A. Other than my assumption he would, yes.

Q. They can assume that from Mr. Meyers' deposition just as well as you, right?

A. I think his is a better source.

Q. You have a figure in here for household services—so the three on the far right, the $356,980 figure, that's all for household services?

A. That's correct.

Q. And that's in the plus column in this kind of human capital calculation?

A. Correct.

Q. In fact, just to get clear, the only one that's in the [119] minus column is this number over here, right?

A. Correct.

Q. That's maintenance, personal maintenance?

A. Personal maintenance.

Q. So this is just a recap, so we're clear, this is how much income, minus deductions, total he would have had?

A. Correct.

Q. This figure is the fringe benefit total?

A. Correct.

Q. This figure is the household services total?

A. Correct.

Q. And then you subtract this personal maintenance figure and that's what gives you your totals down here, right?

A. That's correct. That would be if he worked through age 65.

Q. You described household services as, basically, the value of things that, for example, a married husband might provide to his spouse or if he's a single individual, the services that he does for himself within the house; is that correct?

A. The data is not that narrow. The data is for men, but it is the nature of the injury you just described.

Q. The point—I understand the figure includes everybody, but, for example, you would agree that as it's described household services, if somebody lives alone, they're providing it to themselves, aren't they?

[120] A. Exactly.

Q. So in that situation they're both producing and consuming, basically, the household services, isn't that correct?

A. That would be true.

Q. And in a sense, it's an at wash for a person who lives alone. In other words, no one else enjoys the benefit of that, that they do themselves?

A. Right. If you look at it from the perspective of John Stapleton, then he would have provided those services for himself, and he would have enjoyed those services. So they were valuable to him, though they may not be valuable to anyone else.

Q. In a sense, that goes to the last category that you talked with Mr. Guebert. It's part of the basic enjoyment of life that anybody has apart from economics, money coming in; money going out?

A. But, again, if we're talking about household services, I rather go play golf than mow the lawn. So this is really mowing the lawn.

Q. I understand that. And to an extent it is an extension he's going to mow the lawn or I might choose to play golf instead?

A. That's why I use average.

Q. But you would agree that there's the potential for that figure to overlap somewhat with these other kind of non-in and out calculations that you've made on one component of the value of a life?

APPENDIX K

On the 13th day of July, 2007, the Official Court Reporter for the First Judicial District Court filed in the Office of the Clerk of the Court a Transcript of Proceedings on Appeal to the NEW MEXICO COURT OF APPEALS.

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

[Filed December 4, 2006]

Court of Appeals No. 27,489
No. D-0101-CV-200400242

VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased
Plaintiff,

v.

ENERGEN RESOURCES CORPORATION,
Defendant.

TRANSCRIPT OF PROCEEDINGS

[419] On the 4th day of December, 2006, at 8:47 a.m., this matter came for hearing on JURY TRIAL, before the HONORABLE JAMES A. HALL, Judge of the First Judicial District, State of New Mexico, Division II.

[420] The Plaintiff, VAL JOLLEY, Personal Representative of the Estate of JOHN EVERETT STAPLETON, Deceased, appeared by Counsels of Record, TERRY R. GUEBERT, DON BRUCKNER,

Guebert, Bruckner & Bootes, P.C., Attorneys at Law, Post Office Box 93880, Albuquerque, New Mexico 87199-3880.

The Defendant, ENERGEN RESOURCES CORPORATION, appeared by Counsel of Record, BRADFORD C. BERGE, TRENT A. HOWELL, LARRY MONTANO, Holland & Hart, LLP, Attorneys at Law, 110 North Guadalupe, Suite 1, Santa Fe, New Mexico 87501.

At which time the following proceedings were had:

* * * *

[433] A. Of those incidents?

Q. Not necessarily of those incidents. But would you be surprised that someone would get up and say, "Look, we didn't know that someone could back into a wellhead"? Somebody knowledgeable in the oil and gas industry?

A. They would probably know that.

Q. All right. Now, in the instances where someone backs into it, and there's a release of gas, what you're saying is there's not always an explosion; correct?

A. That's correct.

Q. If you don't have an explosion, people consider themselves lucky in that circumstance, don't they?

A. Well, it depends on the circumstances. Some wells have lots of water in them and they don't ignite.

Q. But whether they do or not is pure luck, isn't it?

A. Right.

MR. BERGE: Objection, Your Honor.

THE COURT: Sustained; argumentative.

BY MR. GUEBERT:

Q. Now, when we were talking about the pipe barriers, those pipe barriers that are installed by

many of the companies around the wellheads, those are installed with pipe that are out in the field anyway, as I understand. Correct?

A. A lot of them are.

Q. And what that is, is that's casing pipe that was used [434] at some point to drill the well, and they take that and they just find—it's lying in their yard, or whatever—it doesn't cost them that much to put it there, does it?

A. I don't know the exact cost of them. They'll usually make it out of pipe that they would have in the yard, anywhere from two-inch up to about six-inch.

Q. All right. And would you agree that that should not be a deterrent, the cost should not be a deterrent to an oil and gas lease operator?

A. I don't think that is.

Q. That's because it's minimal?

A. It's not a major cost.

Q. Now, when you were talking yesterday about the traffic in the Glade—let me ask you about that. There's always been a lot of traffic in the southern part of the Glade, hasn't there?

A. Always down on the wash.

Q. All right. As far as you're concerned, it's always been busy out there as long as you can remember?

A. It's been busy down below. I would disagree with that up top on the mesas. You don't see the traffic up top like you do down below.

Q. Would you agree there's more traffic closer to town than there is to the northern part of the Glade?

A. Yeah. More of it's down right there at the entrance off of Pinon Hills Boulevard.

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